TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~885.~~ 91

THE COUNTY OF RANDOLPH, PLAINTIFF IN ERROR,

vs.

AUGUSTUS T. POST.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED DECEMBER 31, 1875.

SUPREME COURT OF THE UNITED STATES.

No. 885.

THE COUNTY OF RANDOLPH, PLAINTIFF IN ERROR,

vs.

AUGUSTUS T. POST.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

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1 *Writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of Illinois, greeting:

Because in the record and proceedings, and also in the rendition of a judgment in a plea which is in the said circuit court, before you, or some of you, between Augustus T. Post, plaintiff, and County of Randolph, defendant, a manifest error hath happened, to the great damage of said county of Randolph, as by its complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief-Justice of the Supreme Court of the United States of America, this sixteenth day of August, in the year of our Lord one thousand eight hundred and seventy-five, and of our Independence the one hundredth year.

[SEAL.] J. A. JONES,
Clerk of the Circuit Court of the United States for the Southern District of Illinois.

(Indorsed:) Augustus T. Post v. County of Randolph. Writ of error. Filed August 16, 1875. J. A. Jones, clerk.

2 UNITED STATES OF AMERICA, *ss:*

To Augustus T. Post, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Illinois, wherein County of Randolph is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness Samuel H. Treat, district judge of the United States for the southern district of Illinois, and one of the judges of the circuit court of the United States for said district, this sixteenth day of August, in the year of our Lord one thousand eight hundred and seventy-five, and of our Independence the one hundredth year.

S. H. TREAT,
District Judge.

We hereby accept service of the above citation this 16th day of August, 1875.

CULLOM, SCHOLES & MARTIN,
Attys. for Defendant in Error.

(Indorsed:) Supreme Court United States. Augustus T. Post v. County of Randolph. Citation.

3 Pleas in the circuit court of the United States of America for the southern district of Illinois, at a term begun and held at Springfield, in said district, on the first Monday of January, at the January term of said court, in the year of our Lord one thousand eight hundred & seventy-five, and of our Independence the ninety-ninth year. Present, the Hon. Samuel H. Treat, district judge of said district, and pro tempore sole judge of said circuit court in the absence of the Hon. Thomas Drummond, judge of the seventh judicial circuit.

J. A. JONES, *Clerk.*

No. 3800.

AUGUSTUS T. POST
vs.
THE COUNTY OF RANDOLPH. } Assumpsit.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Augustus T. Post is a citizen of the State of New York, plaintiff, who puts in his place Messrs. Bluford Wilson, esq., his attorney, against the County of Randolph, which is a corporation created under the laws of the State of Illinois and doing business therein, in a plea of assumpsit.

4 SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that heretofore, to wit, on the 24th day of September, in the year of our Lord one thousand eight hundred and seventy-three, the said plaintiff, by his said attorney, filed in the office of the clerk of the circuit court of said district its bond for costs, which said bond *are* in the words and figures following, to wit:

Bond for costs, 3800.

Circuit court, United States of America, southern district of Illinois, *ss.*
Adjourned October term, A. D. 1873.

AUGUSTUS T. POST
vs.
THE COUNTY OF RANDOLPH, (IN THE STATE OF Illinois.) } Assumpsit.

I do hereby enter myself security for costs in this cause, and acknowledge that I am bound to pay or cause to be paid all costs which may accrue in this action, either to the opposite party or to any of the officers of this court, in pursuance of the laws of this State and of the United States.

Dated this September 24th, 1873.

BLUFORD WILSON.

(Endorsed:) Filed September 24th, A. D. 1873. J. A. Jones, clerk.

5 Now, afterwards, to wit, on the 2nd day of October, in the year aforesaid, came again the said plaintiff, by his attorney, and filed in the clerk's office of said court his declaration as follows, to wit:

Declaration, 3800.

UNITED STATES OF AMERICA,
Southern District of Illinois:

In the circuit court of the United States for the southern district of Illinois. Of the October (adjourned) term, A. D. 1873.

Augustus T. Post, who is a citizen of the State of New York, complains of the county of Randolph, which is a corporation created under the laws of the State of Illinois and doing business therein, in a plea of assumpsit—

For that whereas, the defendant heretofore, to wit, on the first day of January, A. D. 1872, to wit, at the circuit & district aforesaid, made its twenty-eight certain promissory notes or coupons in writing, and by each of said promissory notes or coupons promised severally to pay to the bearer, at the agency of the State treasurer, in the city of New York, the sum of forty dollars, on the first day of July, A. D. 1872, which period had elapsed before the commencement of this suit, and the plaintiff before the commencement of this suit, to wit, on the first day of June, A. D. 1872, to wit, at the circuit and district aforesaid, became and was, and still is, the lawful bearer of each and every of said promissory
6 notes or coupons, and the defendants, in the consideration of the premises respectively, then and there promised to pay the said several sums of money respectively to the plaintiff according to the several tenor and effect thereof respectively.

And whereas, also, the said defendant afterward, to wit, on the 1st day of September, A. D. 1873, at the said circuit and district, was and still is indebted to the said plaintiff in the sum of ten thousand dollars for money then, before that time, paid, laid out, and expended by the said plaintiff in and about the business of the said defendant at its special instance and request.

And in the sum of ten thousand dollars for money then, before that time, lent and advanced to the defendant by the said plaintiff for the use and benefit of the said defendant at its special instance and request.

And in the sum of ten thousand dollars for money then, before that time, had & received by the said defendant to and for the use of the said plaintiff.

And in the sum of ten thousand dollars for money found to be due from the said defendant on an account then, before that time, stated between them. And in the sum of ten thousand dollars for so
7 much money before that time and then due and payable from the said defendant to the said plaintiff for interest upon, and for the forbearance of divers large sums of money before then due and owing from the said defendant to the said plaintiff, and by the said plaintiff forborn' to the said defendant for divers long spaces of time before then elapsed, at the like special instance and request of the said defendant.

And whereas the defendant afterwards, on the first day of September, A. D. 1873, at the circuit and district aforesaid, in consideration of the premises, then and there promised to pay the several sums of money in this declaration mentioned to the plaintiff on request, yet said defendant has disregarded its promises, and has not, though often requested, paid the said several sums of money, nor either of them, nor any part thereof, to the damage of the said plaintiff ten thousand dollars, and thereupon brings suit, etc.

BLUFORD WILSON,
Atty. for Plaintiff.

County of Randolph to Augustus T. Post, Dr.

To money laid out & expended		$10,000
To money lent and advanced		$10,000
To money had and received		$10,000
To money due on account stated		$10,000
To interest		$10,000

Copies of coupons sued on.

No. 1. $40.00.

COUNTY OF RANDOLPH,
State of Illinois:

The County of Randolph will pay to bearer, on the 1st day of July, 1872, at the agency of the State treasurer, in the city of New York, forty dollars, it being one year's interest on bond No. 1, for $500.

JOHN R. SHANNON,
County Clerk of Randolph Co.

(In red on face:) 1.

The other twenty-seven (27) coupons sued on, are, in all respects, identical in words and figures with the above copy, except in the number of the bond, and on the coupons for interest on bonds numbered 20, 32, 28, 148, 151, 157, 159, 161, 162, 163, 164, 165, 173, 174, 176, 178, 179, 181, 183, 184, 185, 186, 187, 191, 193, 194, 195.

The defendant is notified that the plaintiff will offer the above-described coupons issued by said County of Randolph in payment of interest on the bonds numbered as above, and delivered by said county in payment of stock on the Chester & Tamaron Coal & Railway
9 Company, as evidence under the common as well as under the special counts in the above declaration.

(Endorsed:) Filed October 2nd, 1873. J. A. Jones, clerk.

No. 3801.

AUGUSTUS T. POST
vs.
THE COUNTY OF RANDOLPH. } Assumpsit.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Augustus T. Post is a citizen of the State of New York, plaintiff, who puts in his place Messrs. Bluford Wilson, esq., his attorney, against the County of Randolph, which is a corporation created under the laws of the State of Illinois, and doing business therein, in a plea of assumpsit.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that heretofore, to wit, on the 24th day of September, in the year of our Lord one thousand eight hundred and seventy-three, the said plaintiff, by his said attorney, filed in the office of the clerk of the circuit court of said district its bond for costs, which said bond *are* in the words and figures following, to wit:

10 *Bond for costs, No.* 3801.

Circuit court United States of America, southern district of Illinois, *ss.*
October adjourned term, A. D. 1873.

AUGUSTUS T. POST
vs.
THE COUNTY OF RANDOLPH, IN THE STATE OF Illinois. } Assumpsit.

I do hereby enter myself security for costs in this cause, and acknowledge that I am bound to pay, or cause to be paid, all costs which may accrue in this action, either to the opposite party or to any of the officers of this court, in pursuance of the laws of this State and of the United States.

Dated this twenty-fourth day of September, 1873.

BLUFORD WILSON.

(Endorsed:) Filed September 24th, A. D. 1873. J. A. Jones, clerk.

Declaration, No. 3801.

UNITED STATES OF AMERICA,
Southern District of Illinois:

In the circuit court of the United States for the southern district of Illinois, of the October (adjourned) term, A. D. 1873.

Augustus T. Post, who is a citizen of the State of New York,
11 complains of the County of Randolph, which is a corporation created under the laws of the State of Illinois, and doing business therein, in a plea of assumpsit—

For that whereas the defendant heretofore, to wit, on the first day of January, A. D. 1872, to wit, at the circuit and district aforesaid, made its one hundred & thirty-six certain promissory notes or coupons in writing, and by each of said promissory notes or coupons promised severally to pay the bearer the sum of forty dollars on the first day of July, A. D. 1873, at the agency of the State treasurer, in the city of New York, which period had elapsed before the commencement of this suit; and the plaintiff, before the commencement of this suit, to wit, on the first day of June, A. D. 1872, to wit, at the circuit and district aforesaid, became and was, and still is, the lawful bearer of each and every of said promissory notes or coupons; and the defendants, in consideration of the premises respectively, then and there promised to pay the said several sums of money respectively to the plaintiff, according to the several tenor and effect thereof respectively.

And whereas, also, the said defendant afterward, to wit, on the first day of August, A. D. 1873, at the said circuit and district, was, and still
is, indebted to the said plaintiff in the sum of ten thousand dol-
12 lars, for the price and value of goods, wares, and merchandise, there before that time bargained and sold by the said plaintiff to the said defendant at its special instance and request.

And in the sum of ten thousand dollars for the price and value of goods, wares, and merchandise there before that time sold and delivered by the said plaintiff to the said defendant, at its special instance and request.

And in the sum of ten thousand dollars for money there before that time paid, laid out and expended by the said plaintiff in and about the business of the said defendant at its special instance and request.

And in the sum of ten thousand dollars for money there before that time lent and advanced to the defendant by the said plaintiff for the use and benefit of the said defendant at its special instance and request.

And in the sum of ten thousand dollars for money there before that time had and received by the said defendant to and for the use of the said plaintiff.

And in the sum of ten thousand dollars for the price and value of work, labor and services there before that time done, performed,
13 and bestowed, and materials for the same provided by the said plaintiff for the said defendant at its special instance and request.

And in the sum of ten thousand dollars for money found to be due from the said defendant on an account there before that time stated between them.

And in the sum of ten thousand dollars for so much money before that time, and then due and payable from the said defendant to the said plaintiff for interest upon and for the forbearance of divers large sums of money before then due and owing from the said defendant to the said plaintiff, and by the said plaintiff foreborne to the said defendant for divers long spaces of time before then elapsed, at the like special instance and request of the said defendant.

And whereas the defendant afterwards, on the 1st day of August, A. D. 1873, at the circuit and district aforesaid, in consideration of the premises, then and there promised to pay the several sums of money in this declaration mentioned to the plaintiff on request, yet said defendant has disregarded its promises and has not (though often re-
14 quested) paid the said several sums of money, nor either of them, nor any part thereof, to the damage of the said plaintiff ten thousand dollars, and thereupon he brings suit, etc.

BLUFORD WILSON,
Plaintiff's Attorney.

County of Randolph to Augustus T. Post, Dr.

To goods sold to the defendant	$10,000
To goods sold & delivered	10,000
To money laid out & expended	10,000
To money lent & advanced	10,000
To money had & received	10,000
To the price & value of work	10,000
To money due on account stated	10,000
To interest	10,000

Copies of coupons sued on.

No. 1.] [$40.00

COUNTY OF RANDOLPH, *State of Illinois.*

The county of Randolph will pay to bearer on the 1st day of July, 1873, at the agency of the State Treasurer in the city of New York, forty dollars, it being one year's interest on bond No. 3, for $500.00.

JOHN R. SHANNON,
County Clerk of Randolph Co.

In red on face: 2.

15 Nos. 2 to 135 inclusive.

The other one hundred and thirty-five coupons sued on are in all respects identical in words and figures with the above copy, except that they differ in the number of the bond. They are the coupons for interest on bonds numbered 4 to 38 inclusive, & 1 to 60 inclusive, and 121 to 200 inclusive.

The defendant is notified that the plaintiff will offer the above described coupons issued by said county in payment of interest on the bonds delivered by said county, the payment of stock in the Chester & Tamaroa Coal & Railway Company, as ordinance under the common as well as under the special counts in the above declaration.

(Endorsed:) Filed Oct 2nd, 1873. J. A. Jones, clerk.

Now, afterwards, to wit, at the circuit court begun and held at Springfield, in the State of Illinois, for the southern district thereof, on the 10th day of July, in the year of our Lord one thousand eight hundred and seventy-four—present the Hon. Samuel H. Treat, district judge,
16 the following proceedings were had in said entitled cause, to wit

Leave to withdraw pleas & order to consolidate causes.

AUGUSTUS T. POST
vs.
COUNTY OF RANDOLPH. } T. No. 112, 3800. Assumpsit.

AUGUSTUS T. POST
vs.
COUNTY OF RANDOLPH. } T. No. 113, 3801. Assumpsit.

This day comes the defendant in the last two above-entitled cases by William Hartzell, esq., its attorney, and withdraws its special pleas therein, leave being granted by the court to prove all the facts under the pleas of general issue.

And now by consent of parties, by their attorneys, said last two above-entitled cases are consolidated and continued at cost of defendant.

It is therefore ordered and adjudged by the court that the plaintiff recover of the defendant the costs and charges by him about this suit at this term expended, and that he have execution therefor.

Now, afterwards, to wit, on the 9th day of February, in the year of our Lord one thousand eight hundred and seventy-five, the following further proceedings were had in said entitled cause, to wit:

17 *Order for hearing.*

AUGUSTUS T. POST
vs.
COUNTY OF RANDOLPH. } Assumpsit.

On motion of plaintiff by Messrs. Wilderman & Hamill, his attorneys, this cause is set for hearing on Wednesday the 24th day of February inst.

Now, afterwards, to wit, on the 26th day of February, in the year of of our Lord one thousand eight hundred and seventy-five, the following further proceedings were had in said entitled cause, to wit:

Trial by court.

AUGUSTUS T. POST
vs.
COUNTY OF RANDOLPH. } Assumpsit.

This day comes as well the plaintiff by Messrs. Wilderman & Hamill, his attorneys, as the defendant by William Hartzell, esq., its attorney, and the issue joined by consent is tried by the court, a jury being waived, and the court having heard the evidence and argument of counsel, takes the same under advisement.

Now, afterwards, to wit, on the 3d day of March, in the January term of said court, in the year of our Lord one thousand eight hundred
17½ and seventy-five, the following further proceedings were had in said entitled cause, to wit:

Judgment.

AUGUSTUS T. POST
vs.
COUNTY OF RANDOLPH. } Assumpsit.

This day come again the parties, by their attorneys, and the court, being now sufficiently advised in the premises, finds the issue for the plaintiff, and assess his damages to the sum of six thousand six hundred and fifty dollars and sixty-four cents.

It is therefore ordered and adjudged that the plaintiff recover of the defendant the said sum of six thousand six hundred and fifty dollars and sixty-four cents, his damages aforesaid assessed by the court, together with the sum of one hundred and thirty-five dollars and six cents, his costs and charges by him about his suit in this behalf expended, and that execution issue therefor.

And now, afterwards, to wit, on the 16th day of August, in the year of our Lord one thousand eight hundred and seventy-five, the said defendant filed in the office of the clerk of said court its bill of exceptions herein in words and figures following, to wit:

18 *Bill of exceptions.*

In the circuit court of the United States, southern district of Illinois, January term, 1875.

AUGUST. T. POST
vs.
THE COUNTY OF RANDOLPH. } Assumpsit.

Be it remembered that on the trial of the issues in this cause, which was by the agreement of the parties by the court without the intervention of a jury, the plaintiff, to maintain the issues on his part, introduced and read as evidence one hundred and sixty-four (164) interest-coupons substantially as follows, differing from the copy below in the time of maturity and the number of the bond referred to.

"COUNTY OF RANDOLPH, *State of Illinois:*

"The County of Randolph will pay to the bearer, on the 1st day of July 1872, at the agency of the State treasurer, in the city of New York forty dollars, it being one year's interest on bond No. 183, for $500.

"JOHN R. SHANNON,
"*County Clerk of Randolph Co.*"

And the plaintiff, further to maintain the issues on his part,
19 proved that on the first day of January, 1872, the county court of Randolph made two hundred bonds substantially as follows:

Railroad bond.

UNITED STATES OF AMERICA.

State of Illinois, Randolph County.

No. 1.] [$500.

RAILROAD BOND.

Know all men by these presents that the county of Randolph, State of Illinois, is indebted to the Chester & Tamaroo Coal and Railway Company, or bearer, in the sum of five hundred dollars, lawful money of the United States, with interest from date at the rate of eight per cent. per annum, payable annually, on the first day of July in each year, at the agency of the State treasurer, in the city of New York, on the presentation and surrender of the respective interest-coupons hereto annexed.

The principal of this bond shall be due and payable ten years from the date hereof, at said agency of State treasurer in New York.

This bond is one of a series of bonds issued by the county of Randolph in payment for one hundred thousand dollars of the capital stock of the Chester & Tamaroa Coal & Railway Company, in pursuance of an election held by the legal voters of Randolph County, Illinois,
20 on the 6th day of June, 1870, and by virtue of the provisions of an act of the general assembly of the State of Illinois, entitled "An act supplemental to an act to provide for a general system of railroad corporations."

And for the payment of said sum of money and accruing interest thereon in the manner aforesaid the faith of the county of Randolph is hereby irrevocably pledged, as also property, revenue, and resources.

In testimony whereof the county court of said county of Randolph have caused these presents to be signed by the county judge and by the clerk of the county court of said county, and who sealed with the seal of said court, at Chester, Illinois, in said county, on this 1st day of January, A. D. 1872.

ALEXANDER WOOD,
County Judge.

JOHN R. SHANNON,
County Clerk.

And the plaintiff also proves that the coupons offered in evidence were attached to the bonds for *for* interest thereon according to their terms, and that the bonds and coupons were delivered to the Chester

and Tamaroa Coal and Railroad Company in payment for the county subscription to its stock.

The plaintiff, to maintain the issue on his part, offered in evi-
21 dence the contract made by the county court of Randolph County, also the order of the county court extending the time for the completion of the road.

Order of county court, Randolph County.

County court, special October term, A. D. 1871.

STATE OF ILLINOIS,
Randolph County:

On Friday, the sixth day of October, in the year of our Lord one thousand eight hundred and seventy-one, being the first day of special October term, 1871.

Present: Hon. Alex. Hood, county judge.
" John Wilson, associate judge.

Attest:
JOHN R. SHANNON, *Clerk.*

Be it remembered that on Friday, the sixth day of October, A. D. 1871, the same being as yet one of the days of the aforesaid term of said county court, the following among other proceedings was had and entered of record in the words and figures following, to wit:

IN THE MATTER OF THE CHESTER AND TAMA-
roa Coal and Railroad Company.

Now comes D. C. Barber, president of said company, and others, and represent to the court that the work on said railroad is far ad-
22 vanced toward completion through the county of Randolph, and that from unavoidable difficulties of transportation, caused by unprecedented low water in the rivers, the said company finds it impossible to get their iron upon the ground in the time contemplated by the orders heretofore passed by this court in relation to the matter, and therefore ask for an extension of time to complete said railroad; and this matter being considered by the court, it is ordered that the following be entered upon the records of the court as the order of this court in relation to this matter, viz:

Whereas the legal voters of Randolph County did, on the 6th day of June, A. D. 1870, vote in favor of subscribing $100,000 to the capital stock of the Chester and Tamaroa Coal and Railroad Company, and the issuing of the sum of $100,000 in the bonds of said county in payment of subscription, according to the terms and conditions of an order of the county court made at a special term of said court on the 3d day of May, A. D. 1870, submitting said question to the legal voters of said
23 county, and directing the clerk to give notice of said election; and whereas it was provided in said order that no bonds shall be registered or paid until the said railroad should be built and cars should have run thereon from within the corporate limits of the city of Chester to the Randolph County line; and it was provided further that said bonds shall not be registered or paid as aforesaid unless said railroad shall be completed to said county-line within eighteen months after said stock shall be subscribed; and whereas the said county did, on the 27th day of June, A. D. 1870, subscribe said stock on the books of said company by order of said county court; and whereas the said court made an order on the 26th day of July, A. D. 1870, that said bonds be executed and placed in the hands of Alexander Hood, Peter Wicklein, and

John R. Shannon, as trustees, which order was, on the 17th day of August, A. D. 1870, modified by an order of said court, that said bonds be executed only at a regular term of said court; and whereas said
24 order was again, on the 6th day of September, A. D. 1871, so modified as to order the judge of said court and the clerk thereof to execute said bonds and affix the seal of said court thereto, and to deliver to said trustees, and that said company shall deliver to said trustees certificate of stock to the amount of $100,000, to be delivered to said county court or their order; and whereas said company has executed and delivered to said trustees for said county a certificate of stock to the amount of $100,000, in compliance with said order; and whereas the time for completing said road will expire on the 27th day of December, A. D. 1871, and it appearing that said company are doing all they can to complete said road within said time: It is therefore ordered by the court that the time for completion of said railroad be extended to the first day of February, A. D. 1872, and that in case said road shall be completed and cars shall have run thereon from within the corporate limits of the city of Chester to the county-line between the counties of Randolph and Perry by the first day of February, A. D. 1872, the said trustees shall deliver said bonds to said company or their author-
25 ized agent, and shall deliver said certificate of stock to said county court or their order.

STATE OF ILLINOIS, *Randolph County:*

I, John T. McBride, county clerk in and for said county and State, do hereby certify that the foregoing is a true and correct copy of the proceedings in the above cause, as appears of record in my office.

Witness my hand and the seal of said court, at Chester, this 13th day of September, A. D. 1875.

[L. S.] JOHN T. McBRIDE, *Co. Clk.*

Plaintiff proved that the road was built and completed within the time required by the county court through the county of Randolph according to contract; that it was upon its completion put in operation, and has been ever since, and is now, in full operation, with trains of cars carrying freight and passengers as a common carrier through said Randolph County, on the line prescribed by the contract; that said bonds were issued and delivered to said railroad company by the county
26 officers of said Randolph County. But said bonds were not issued and delivered to said railroad company until said county officers who issued and delivered said bonds had first rode over said railroad in the cars of said railroad company through said county of Randolph and expressed themselves satisfied with the construction of said railroad.

Report of trustees, &c.

County court, special February term, A. D. 1872.

STATE OF ILLINOIS,
Randolph County, ss:

On the 8th day of February, in the year of our Lord one thousand eight hundred and seventy-two, being the second day of sp'l February term, 1872.

Present, Hon. Alex. Hood, county judge.
" Phillip Wahrheim, } Associate jud es.
" John Wilson, }

Attest:
JOHN R. SHANNON, *Clerk.*

Be it remembered that on the 8th day of February, A. D. 1872, the same being as yet one of the days of the aforesaid term of said county court, the following, among other proceedings, was had and entered of record in the words and figures following, to wit:

"Report of trustees as to the delivery of bonds to the Chester and Tamaroa Coal and Railroad Company.

27 "Now come Alexander Hood and John R. Shannon, on the part of the trustees heretofore appointed by the court, in the matter of the bonds ordered to be issued to said railroad company, and report that, in obedience to the order of said court, upon completion of said Chester and Tamaroa Coal and Railroad from the corporate limits of the city of Chester to the county-line of Randolph and Perry counties, and the cars having run thereon, they did, on the 19th day of January, A. D. 1872, deliver to the president of said Chester and Tamaroa Coal and Railroad Company the sum of one hundred thousand dollars in the bonds of Randolph County, as heretofore directed by said court, taking the receipt of said president therefor; and the said receipt is presented, examined, approved, and ordered to be recorded.

"*Receipt of railroad co.*

"Received January 19th, 1872, of Alexander Hood, Peter Wicklein, and John R. Shannon, trustees appointed by the county court of Randolph County, the sum of one hundred thousand dollars, in the bonds of Randolph County, in full of the stock-subscription of one
28 hundred thousand dollars voted by said Randolph County in the State of Illinois, the certificate of which stock, to the amount of one hundred thousand dollars, has been delivered to said trustees for said county of Randolph.

"D. C. BARBER,
"*President of the Chester & Tamaroa Coal & R. R. Co.*"

STATE OF ILLINOIS, *Randolph County, ss:*

I, John T. McBride, county clerk in and for said county and State, do hereby certify that the foregoing is a true and correct copy *copy* of the proceedings in said cause, as appears of record in my office.

In witness whereof I have hereunto set my hand and the seal of said court this 13th day of September, A. D. 1875, at Chester.

[L. S.] JOHN T. McBRIDE,
County Clerk.

And the plaintiff, further to maintain the issue on his part, offered and read to the court, from the printed statute-book, an act of the general assembly of the State of Illinois entitled "An act to incorporate the Chester and Tamaroa Coal and Railroad Company," approved March 4, 1869, as follows:

29 *Act to incorporate Chester & Tamaroa Coal & R. R. Co.*

SECTION 1. Be it enacted by the people of the State of Illinois represented in the general assembly, That Andrew J. Bryden, H. E. Hosford, De Witt C. Barber, Thomas M. Sams, William K. Murphy, Joel M. Sullivan, R. M. Davis, John H. Barber, Zebidee P. Curlee, Joseph B. Holmes, and John M. McCutchen, and their associates, successors,

and assigns, be, and they are hereby, created a body politic and corporate, under the name and style of "Chester and Tamaroa Coal and Railroad Company," and by that name be, and they are hereby, made capable in law and equity to sue and be sued, plead and be impleaded, defend and be defended, in any court of law and equity in this State; to make, have, and use a common seal, and the same to renew and alter at pleasure; and shall be, and hereby are, vested with all power, privileges, and immunities which are or may be necessary to engage in mining, and to construct, complete, and operate a railroad, with single or double track, commencing at Chester, in Randolph County, Illinois; thence running easterly on the most eligible route, via Pinckneyville, in Henry County, Illinois, to Tamaroa, in said Perry County; and for this
30 purpose said company are authorized to lay out their said railroad, not exceeding one hundred feet in width through the whole length, and, for the purpose of cuttings, embankments, stone or gravel, may take as much more land as may be necessary for the proper construction and security of said railroad, and shall have power to extend the same to and connect with or cross over any other railroad within the State of Illinois, and may make such lateral or branch road or roads to any coal-lands belonging to said company as they may deem necessary for the successful prosecution of their business; and said company may enter upon and take possession of so much land as may be necessary for the construction and maintenance of the said railroad and branches, depots, side-tracks, water-stations, engine-houses, machine-shops, and other buildings and appendages necessary to the construction and working of said road; and in case said land be not donated to said company for such purpose, it shall be lawful for said company to proceed to condemn said land, as provided by the laws of the State concerning right of way.

31 § 2. The said corporation may take and transport upon said railroad any person or persons, merchandise, or other property, and may fix, establish, take, and receive such rates of toll for any passenger and property transported upon the same as the directors shall from time to time establish, subject to such limitations and restrictions as are or may be provided by general law.

§ 3. The said corporation is hereby vested with power to purchase, hold, and convey real and personal estate; to give and receive promissory notes; to enter into and carry on all kinds of mechanical and manufacturing business; to erect mills, furnaces, founderies, factories, and machine-shops, for the manufacture of flour, lumber, iron, castings, machinery, farming-utensils, and any other kind or description of article not forbidden by law; and may erect and build marine ways or dry-docks, and use the same for the purposes of repairing and building boats, barges, or any other description of water-craft; may buy, build, and own boats, barges, or other vessels, and navigate the same for the transportation of their coal, manufactures, or for other purposes.

32 § 4. The capital stock of said corporation shall be one million dollars, which may be increased to any sum not exceeding five million dollars, to be divided into shares of one hundred dollars each, which is hereby declared personal property, and transferable on the books of the company in such manner as shall be prescribed by the by-laws of said corporation.

§ 5. It shall be lawful for said company, from time to time, to borrow such sum or sums of money as may be necessary for completing and operating said railroad, or for conducting their mining or manufacturing business, and to issue and dispose of their bonds, in denominations of

not less than one hundred dollars, bearing a rate of interest not exceeding ten per cent. per annum for any amount so borrowed, and mortgage the real and personal estate of said corporation, or to convey the same by deed of trust, to secure the payment of any debt contracted by said company for the purposes aforesaid.

§ 6. In the sale or mortgaging of the real or personal estate of said corporation, the conveyances shall be signed by the president
33 and countersigned by the secretary, under the seal of the corporation, and be acknowledged in the same manner as is provided by law for the acknowledging of deeds.

§ 7. The affairs of said company shall be managed by a board of eleven directors, which may be increased to any number not exceeding thirteen, a majority of whom shall constitute a quorum to do business; and Andrew J. Bryden, H. E. Hosford, De Witt C. Barber, Thomas M. Sams, William R. Murphy, Joel M. Sullivan, R. M. Davis, John H. Barber, Zebidee P. Curlee, Joseph B. Holmes, and John M. McCutchen are hereby appointed the first board, who shall hold their offices until their successors are elected and qualified, in such manner as may be prescribed by the by-laws of said company. Said board shall have the power of electing one of their number president, and such other officers as may be prescribed by the by-laws; and said corporation shall be, and is hereby, vested with all the powers conferred upon railroad incorporations by the general railroad laws of the State of Illinois, or any amendment thereto.

§ 8. This act shall be a public act, and take effect and be in
34 force from and after its passage.

Approved March 4, 1869.

And the plaintiff then offered and read in evidence a certain other act of the general assembly of the State of Illinois, entitled "An act supplemental to an act to incorporate the Chester and Tamaroa Coal and Railroad Company, approved March 4, 1869."

An act supplemental to an act to incorporate the Chester & Tamaroa Coal & R. R. Co.

SECTION 1. Be it enacted by the people of the State of Illinois, represented in the general assembly, That section three of said act, to which this act is supplemental, be, and the same is hereby, repealed, and in lieu thereof and the powers therein conferred, the said corporation shall have power to lease, purchase, and hold real estate along the line of their said road, and personal property, and convey the same, so far as may be necessary to carry on the business of said corporation; and may, at any point or points along the line of their said railroad, manufacture iron or other minerals, and may establish, maintain, and
35 operate machine-shops and furnaces for the purposes aforesaid, and may mine coal and establish such dock or docks at the terminus of their road on the Mississippi River as may be necessary to facilitate the transportation of their coal, iron, or other minerals.

§ 2. This act shall take effect from and after its passage.

Approved March 4, 1869.

And the plaintiff then offered in evidence and read to the court the act of the general assembly of the State of Illinois referred to in the said bonds as follows:

77. Subscriptions and loans. Whenever the citizens of any city or county in this State are desirous that said city or county should subscribe for stock in any railroad company already organized or incorporated, or hereafter to be organized or incorporated under any law of this State, such city or county may, and are hereby authorized, to purchase or subscribe for shares of the capital stock in any such company, in any sum not exceeding $100,000, for each of such cities or counties; and the stock so subscribed for or purchased shall be
36 under the control of the county court of *of* the county, or common council of the city, making such subscription or purchase, in all respects as stock owned by individuals.

78. For the payment of said stock, the judges of the county court of the county, or the common council of the city, making such subscription or purchase, are hereby authorized to borrow money, at a rate not exceeding 10 per cent. per annum, and to pledge the faith of the county or city for the annual payment of the interest, and the ultimate redemption of the principal; or if the said judges or common council should deem it most advisable, they are hereby authorized to pay for such subscription or purchase in bonds of the city or county making such subscription, to be drawn for that purchase, in sums not less than $50, bearing interest not exceeding 10 per centum per annum, provided that no bond shall be paid out at a rate less than par value.

79. The railroad companies already organized or incorporated, or hereafter to be organized or incorporated, under the laws of this State, are hereby authorized to receive the bonds of any county or city
37 becoming subscribers to the capital stock of such company, at par and in lieu of cash, and to issue their bonds, bearing interest not exceeding 10 per centum per annum, for any money by them borrowed for the construction for their railroad and fixtures, or for the purchase of engines and cars, and for such purpose may dispose of any bonds by them received as aforesaid.

80. No subscription shall be made, or purchase or bond issued, by any county or city under the provisions of this act, whereby any debt shall be created by said judge of the county court of any county, or by the common council of any city, to pay any such subscription, unless a majority of the qualified voters of such county or city (taking as a standard the number of votes thrown at the last general election previous to the vote had upon the question of subscription under this act for county officers) shall vote for the same, and the judges of the county court of any county, or the common council of any city, desiring to take stock as aforesaid shall give at least 30 days' notice in the same manner as notices are given for
38 election of State or county officers in said counties, requiring said electors of said counties or said cities to vote upon the day named in such notices, at their usual place of voting, for or against the subscription for said capital stock which they may propose to make, and said notices shall specify the company in which stock is proposed to be subscribed, the amount which it is proposed to take, and the time which the bonds proposed to be issued are to run, and the interest which said bonds are to bear; or in case it is proposed to borrow money to pay such subscription, then the notices shall state the terms upon which loan is to be effected, and the opinion of the electors shall be expressed upon their ballots, "for subscription," or "against subscription," and counted and returned by the judges and clerks of elections, as in other cases; and if a majority of the voters of said county or city, assuming the standard aforesaid, shall be in favor of the same, such

authorized subscription or purchase, or any part thereof, shall then be made by said judges or common council. In case any election had under this act is held upon a day of a general election, then
39 the number of votes thrown, at such general election for county officers shall be the standard of the number of qualified voters as aforesaid. No bonds shall be issued under the provisions of this act by any county or city, excepting for the amounts required to be paid at the time of subscription, and for the amounts of, and at the time when assessments upon all the stockholders of said company shall be regularly assessed and made payable.

81. Any city or county in this State which, under the provisions of the foregoing act, has heretofore subscribed, or may hereafter subscribe, for stock in any railroad company, payable in the bonds of said city or county, it shall be lawful for the city council of such city, or the judges of such county, and they are hereby authorized and empowered, to issue and deliver to such railroad company the whole or any portion of the bonds of such city or county, payable on such subscription at any time hereafter, when, in their opinion, the interest of such city or county will be promoted thereby, whether the assessments upon the stockholders of said company have been regularly assessed and made payable or not.

40 And prov'ed that, before the said bonds and coupons were delivered by the county court of Randolph County to the Chester and Tamaron Coal and Railroad Company, who is completing a railroad from Chester to Tamaron.

And this was all the evidence offered in the cause.

And thereupon the defendants, by its attorneys, insisted that the facts aforesaid were not sufficient in law to support the issue on the part of the plaintiff, but the court held and determined that the facts so proven as aforesaid were sufficient to support the issues for the plaintiff; and the said defendant then and there excepted to the finding and determination of the court, and prayed that its said exception might be signed and sealed by the court; which is done accordingly.

S. H. TREAT. [SEAL.]

(Endorsed:) Filed, August 16th, 1875. J. A. Jones, clk.

Bond.

Bond on writ of error, filed in clerk's office of said court by county of Randolph.

41 Know all men by these presents, that we, the county of Randolph, by John Wilson, chairman, and John Morrison and Patrick Faherty, members of the board of county commissioners, and John F. Schuchert and Joseph B. Holmes, of the county of Randolph and State of Illinois, are held and firmly bound unto Augustus T. Post in the penal sum of eight thousand dollars, for the payment of which, well and truly to be made, we and each of us bind ourselves and our successors in office, firmly by these presents, sealed with our seals, and dated at Springfield, this third day of May, in the year of our Lord one thousand eight hundred and seventy-five.

The condition of the above obligation is such, that whereas the said Augustus T. Post did, on the third day of March, one thousand eight hundred and seventy-five, at a term of the circuit court of the United States then being holden within and for the southern district of the State of Illinois, obtain a judgment against the above-bounden county of Randolph for the sum of five thousand six hundred & sixty-two dollars and thirty-six cents, and costs of suit, from which judgment the

said county of Randolph has prayed for and obtained a writ of
42 error to the Supreme Court of the United States:

Now, if the said county of Randolph shall duly prosecute said writ of error, and shall moreover pay the amount of the said judgment, costs, interest, and damages rendered and to be rendered against it, the said county of Randolph, in case the said judgment shall be affirmed in the said Supreme Court, then the above obligation to be null and void; otherwise to remain in full force and virtue.

THE COUNTY OF RANDOLPH,
By JOHN WILSON, [SEAL.]
Chairman Board of County Commissioners.
JOHN MORRISON, [SEAL.]
Member of Board of County Commissioners.
PATRICK FAHERTY, [SEAL.]
Member of Board of County Commissioners.
JOHN F. SCHUCHERT. [SEAL.]
JOS. B. HOLMES. [SEAL.]

STATE OF ILLINOIS,
Randolph County, ss:

I, John T. McBride, clerk of the county court within and for the county and State aforesaid, do hereby certify that Mess. John Wilson, John Morrison, and Patrick Faherty, whose genuine signatures appear to the foregoing appeal-bond, are chairman & members, respect-
43 ively, constituting the board of county commissioners of the county of Randolph and State of Illinois, and that they were duly commissioned and sworn as such; and further, that I believe Messrs. John F. Schuchert and Joseph B. Holmes, whose genuine signatures appear to said bond as securities, to be fully sufficient for the amount thereof.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court, at Chester, this 13th day of May, A. D. 1875.

[L. S.] JOHN T. McBRIDE,
Co. Clk.

Approved:
S. H. TREAT, *Dist. Judge.*

(Endorsed:) Filed 3rd day of May, A. D. 1875. J. A. Jones, clerk.

UNITED STATES OF AMERICA,
Southern District of Illinois, ss:

I, J. A. Jones, clerk of circuit court of the United States for the said southern district of Illinois, do hereby certify the foregoing to be a true and complete transcript of the papers filed and proceedings
44 thereon had in a certain cause wherein Augustus T. Post is plaintiff, and county of Randolph defendant, as truly and completely as the same appear of file and record in my said office.

In witness whereof I have hereunto set my hand and seal of said court, at Springfield, in said district, this eighth day of October, in the year of our Lord one thousand eight hundred and seventy-five, and of our Independence the one hundredth year.

[SEAL.] J. A. JONES, *Clk.*

(Indorsed on cover:) No. 885. The county of Randolph, plaintiff in error, vs. Augustus T. Post. S. Illinois C. C. U. S. Filed 31 December, 1875.

REC. 885—2

IN THE SUPREME COURT OF THE UNITED STATES.

THE COUNTY OF RANDOLPH, Plt'ff in Error,

vs.

AUGUSTUS T. POST, Def't in Error.

In Error to the Circuit Court of the United States, Southern District of Illinois.

BRIEF FOR PLAINTIFF IN ERROR.

In the Supreme Court of United States.

THE COUNTY OF RANDOLPH,
Plaintiff in Error,
vs.
AUGUSTUS T. POST,
Defendant in Error.

No. 885.

In Error to the Circuit Court of the United States, Southern District of Illinois.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE,

1. This suit was brought by the defendant in error against the county of Randolph, to recover the amount of one hundred and sixty-four, (164) coupons, substantially as follows :

"COUNTY OF RANDOLPH, STATE OF ILLINOIS."

"*The County of Randolph will pay to the bearer on the "first day of July* 1872, *at the Agency of the State Treas- "urer in the City of New York, Forty Dollars, it being one "year's interest on Bond No.* 183 *for* $500.

JOHN R. SHANNON,
County Clerk of Randolph County.

Alexander Hood, County Judge of Randolph County, made two hundred bonds, substantially as follows :

No. 1. RAILROAD BOND, $500.

"KNOW ALL MEN BY THESE PRESENTS:—That the County "of Randolph, State of Illinois, is indebted to the Chester "& Tamaroa Coal and Railway Company, or bearer, in "the sum of Five Hundred Dollars of lawful money of the "United States, with interest from date at the rate of eight "per cent. per annum, payable annually on the first day of "July in each year, at the Agency of the State Treasurer "in the City of New York, on the presentation and surren- "der of the respective interest coupons hereto attached.

"The principal of this Bond shall be due and paya- "ble ten years from the date hereof at said Agency of the "State Treasurer in New York.

"This Bond is one of a series of Bonds issued by the "County of Randolph, in payment for one hundred thou- "sand dollars of the capital stock of the Chester & Tama- "roa Coal and Railway Company, in pursuance of an "election held by the legal voters of Randolph county, Il- "linois, on the 6th day of June, 1870, and by virtue of the "provisions of an act of the General Assembly of the "State of Illinois, entitled 'An Act supplemental to an "Act to provide for a general system of Railroad incorpo- "ration.' And for the payment of the said sum of money "and accruing interest thereon, in the manner aforesaid, "the faith of the County of Randolph is hereby irrevoca- "bly pledged, and also its property, revenue, and resour- "ces.

"In testimony whereof, the County Court of said "County of Randolph have caused these presents to be "signed by the County Judge and by the Clerk of the "County Court of said County, and to be sealed with the "seal of said Court at Chester, Illinois, in said County, "on this 1st day of January, A. D. 1872.

ALEXANDER HOOD,
County Judge.

JOHN R. SHANNON,
County Clerk.

The General Assembly of the State of Illinois, by two acts, approved on the 4th day of March, 1869, the first entitled, "An Act to incorporate the Chester & Tamaroa Coal and Railroad Company," and the other, "An Act supplemental to an act to incorporate the Chester & Tamaroa Coal and Railroad Company," created that incorporation with all power and privileges which are or may be necessary to engage in "mining," and to construct a railroad from Chester to Tamaroa.

The third section of the original act was modified by the supplemental act, and is as follows: * * * "The "said corporation shall have power to lease, purchase "and hold real estate along the line of their said road, "and personal property, and convey the same, so far as "may be necessary to carry on the business of said cor- "poration, and may, at any point along the line of their "said railroad, manufacture iron or other minerals, and "may establish, maintain and operate machine shops and "furnaces for the purposes aforesaid; and may mine coal "and establish such dock or docks at the terminus of their "road, on the Mississippi river, as may be necessary to "facilitate the transportation of their coal, iron and other "minerals."

The fifth section of the act provides that the company shall have power to borrow money for completing and operating its railroad, and for conducting its mining or manufacturing business; to issue bonds, and to mortgage its real and personal property to secure its loans. *Private Laws* 1869; *vol.* 2, *pages* 824-859.

The County Court of Randolph county subscribed to the capital stock of the Railroad Company on the 27th day of June, 1870, as authorized by a vote of the legal voters of the county, at an election held on the 3rd day of

May, 1870. It was a condition upon which the completion of the subscription and the issue of the bonds was voted, "That until the railroad of the company should be built, "and cars should have run thereon from within the cor- "porate limits of the city of Chester to the line of the "county, no bonds should be registered or paid; and no "bonds should be registered or paid unless the said rail- "road should be completed from Chester to the county "line within eighteen months from the time of sub- "scription."

The railroad was not completed in the manner fixed in the condition until the 19th day of January, 1872, though the time for its completion expired on the 27th day of December, 1871; but the plaintiff proved that by an order of the County Court, made on the 6th day of October, 1871, the time for its completion was extended to the 1st day of February, 1872.

On the 19th day of January, 1872, the bonds were delivered by the Trustees to the Railroad Company. [See page 12, printed record.]

BRIEF.

On the facts stated, the plaintiff in error submits that the coupons sued on by the plaintiff below, are void—

1. Upon the ground that the issue of the bonds was forbidden by the Constitution of the State of Illinois.

By the separate article of the Constitution of the State of Illinois, entitled "Municipal subscriptions to railroads "or private corporations," it is provided: "No county, city, town, township, or other municipality shall ever be- "come subscriber to the capital stock of any railroad or "private corporation, or make donation to, or loan its "credit in aid of such corporation: *provided, however*, that

"the adoption of this article shall not be construed as af-
"fecting the right of any such municipality to make such
"subscriptions, where the same have been authorized un-
"der existing laws by a vote of the people of such munic-
"ipality, prior to such adoption."

The effect of this provision of the Constitution is to establish the general incapacity of counties to issue bonds in payment for subscriptions to the capital stock of railroad corporations.

There is no exception to this rule of incapacity other than that established by the article of the Constition, quoted; that is, where the subscription was voted by the people of the county, before the adoption of the article, under the authority of some law then existing.

The coupons sued on are not datcd. The bonds produced in evidence bear date on the 1st day of January, 1872.

The clause of the Constitution, quoted above, took effect July 2, 1870.

Richards, et. al. vs. Donaghue; 66 *Ill.* 73.

The issue of the bonds and coupons are, therefore, *prima facie* within the inhibition of the Constitution.

The separate article of the Constitution is cited to show that after its adoption a legal issue of the bonds of the county of Randolph was impossible; unless in accordance with the terms of the subscription made on the 27th day of June, 1870.

The subscription was, if made by proper authority, a contract between the county and the railroad corporation, and the Constitution deprived the county and its officers of all power in respect to that class of subjects, except such as were necessary to enable the county to complete the contract according to the measure of its duty as defined by the contract itself.

The Constitution also incapacitates the county to assume new or additional duties or obligations, or to waive any of the conditions upon which its duty to issue its bonds was by the contract made to depend. All the powers of the county officers, after the adoption of the Constitution, were, with respect to the execution of the contract, merely ministerial, and in no sense discretionary.

The railroad was not completed from within the limits of the city of Chester to the county line of Randolph county within eighteen months from the date of the subscription, as provided by the contract of subscription. The bonds were therefore made by the officers of the county, without authority of law, and are for that reason void.

The test of the soundness of this conclusion is, that as the railroad company did not complete its road to the extent and in the manner contemplated by the vote of the people and the contract of subscription made by the County Court in pursuance of the vote, it had no legal right, after its failure to do so, to demand or compel the issue and delivery of the county bonds.

If the railroad company had no legal right, on account of its non-compliance with the contract, to demand of the county the issue and delivery of the bonds, the officers of the county had no legal power or authority to issue and deliver the bonds.

The plaintiff is not a *bona fide* holder of the coupons sued on, to the extent that he is not chargeable with notice of the want of authority on the part of the County Judge of Randolph county to make the bonds and coupons in question.

Cases that arise in Illinois, since the adoption of the Constitution of 1870, do not fall within any of the decis-

ions of this court defining the rights of the holders of the bonds of municipal corporations.

Before the adoption of the Constitution it was settled, that to warrant an issue of the bonds of a municipal corporation there must be an original authority by statute. It was held that municipal corporations had not the power, except through special authority of the legislature, to issue corporate bonds which would bind them.

Kennicott vs. The Supervisors; 16 *Wall.*, 465.

Since the Constitution of 1870 took effect the legislature has no power to confer upon municipal corporations the authority to issue their bonds to railroad corporations, and that Constitution, by its own operation, abrogated all laws previously passed intended to confer such authority, except to the extent that rights were then vested, under contracts or subscriptions, which had been before that time authorized by a vote of the people of particular municipalities.

In every case where the power to issue bonds remained with municipal corporations it was, as the result of the provisions of the Constitution, made special and dependent upon a state of facts peculiar to each corporate body, and the burden of proof is upon parties that assert rights based upon the assumed existence of the facts necessary to support the power.

In the case of Kennicott *vs.* The Supervisors, *supra*, it is said: "If an election or other fact is required to authorize the issue of the bonds of municipal corporations, and if the result of that election, or the existence of that fact is by law to be ascertained or declared by any judge, officer or tribunal, and that judge, officer or tribunal, on behalf of the corporation, executes or issues the bonds, with

a recital that the election has been held, or the fact exists or has taken place, this will be sufficient evidence of the fact to all *bona fide* holders of the bonds.

In this instance, the facts required to authorize the issue of the bonds of Randolph county to the Chester & Tamaroa Coal and Railroad Company were, that at the time of the adoption of the Constitution—July 2, 1870—there was a valid subsisting contract between the county on the one part and the railroad company on the other; that upon the completion of the road of the company from within the limits of the city of Chester to the line of Randolph county, and the running of cars thereon, on or by the 27th day of December, 1871, the county would accept an amount of the stock of the company, and issue its bonds in payment therefor.

No law referred the ascertainment of the existence of these facts, or any of them, to the County Judge of Randolph county, who alone made the bonds.

The County Judge of Randolph county had no authority by virtue of his office to ascertain or declare any of the required facts upon which the authority of the county to issue bonds depended, nor to issue the bonds, and it may be added that the County Clerk of Randolph county had no authority, as incidental to his office, to make or sign the coupons which purport to be made in his name.

In that view of the case, the plaintiff is bound to prove an authority by the records of the County Court to the Judge and Clerk to make the bonds and coupons, and that line of inquiry as well as of proof makes notice to him of the contents of such records.

To make the statement of the point clearer,—the

the limits of the city of Chester to the county line of Randolph county within eighteen months from the date of the subscription,—June 27, 1870—and that the railroad company did not complete its railroad within the time limited by the vote and subscription.

The plaintiff, as will appear from the record, (pages 10, 11) proved—and the court found—that on the 6th day of October, 1871, the railroad corporation, in open County Court, confessed its obligation, under the contract of subscription, to complete its road within eighteen months from the 27th day of June, 1870, the date of the subscription, and its inability to perform that obligation and condition, and obtained the consent of the County Court to an extension of the time, and did not in fact complete the road as provided in the contract until the 19th day of January, 1872

It was a further fact, which will appear as found by the court below, that while the County Court authorized the County Judge to execute the county bonds, the ascertainment of the facts upon which the delivery of the bonds to the company was made to depend was referred to Alexander Hood, Peter Wicklein and John R. Shannon, as trustees.

The records of the County Court show—and the Circuit Court found—that the County Judge was ordered to sign county bonds and deliver them to the trustees above named, and the trustees were ordered, in case said road should be completed to the extent provided in the contract by the 1st day of February, 1872, to deliver the bonds to the company.

These facts illustrate the value as well as the legal justice of the rule which should treat the recitals contained in

these bonds as evidence against the county for any purpose.

The County Judge and the Clerk were authorized by the County Court to execute the bonds of the county—the mere promise of the county to pay—without any recitals whatever.

Trustees were appointed to receive and hold the bonds, and upon the performance by the railroad company of new conditions, altogether different from those contained in the original contract, to the satisfaction of the trustees, the bonds were to be delivered to the railroad company; and yet it is argued that the recitals contained in the bonds issued under such circumstances are evidence sufficient to the holders.

The Supreme Court of Illinois, in the case of Jackson County *vs.* Brush—77 Ill,, 63, 64—meet and dispose of this precise question, and hold an attempt by the authorities of a county to delegate their power to trustees is unlawful and void.

The plaintiff cannot, upon the facts found, be regarded as a *bona fide* holder of the bonds; nor is the county affected by any of the recitals contained therein.

Our view of the case is not affected by the rule so frequently attested by this court and followed elsewhere, that when a municipal corporation has power, under any circumstances, to issue negotiable securities, the *bona fide* holder has a right to presume that they were issued under the circumstances which give the requisite authority.

The inquiry must be as to the possible powers of municipal corporations at the date of negotiable securities, which is *prima facie*, the date of their issue; and we think we have shown that by the operation of the Constitution

County Judge of Randolph county was not a judge, officer or tribunal authorized by law to ascertain or declare the result of an election, or the existence of any fact required to authorize the county to make or issue its bonds; nor is he, by virtue of his office, appointed to execute or issue county bonds; therefore he can bind the county neither by the execution of bonds nor recitals therein.

Whatever authority the County Judge or the Clerk possessed to execute bonds or coupons was derived from the appointments of the County Court alone. Of this, all persons have notice.

The authority of the County Court to appoint agents to make contracts on behalf of the county will be found—Gross' Statutes; chap. 27, sec. 17, p. 160.

We repeat that it is a necessary part of the plaintiff's case to prove the special appointment or authority of the County Judge and County Clerk to execute the bonds and coupons, and such appointment or authority can only be established by the records of the court—and that record is notice of all that it contains—and it shows that the railroad corporation did not comply with the conditions of the subscription. [See record page 22; printed record, pp. 10, 11.]

We sum up by saying, that the authority remaining in counties or other municipal corporations, after the adoption of the Constitution, to issue their bonds to private corporations, is special; limited to the precise obligations and duties of each county or other municipal corporation as they existed on the 2nd day of July, 1870.

That no power exists anywhere to modify or enlarge the contract, or the powers or duties of such corporations, or to waive conditions for the benefit of such corporation

upon which such duties depended when the Constitution took effect.

That by the terms of the contract of subscription, as well as the votes of the people of Randolph county, the right of the Chester & Tamaroa Coal and Railroad Company to demand the issue of the bonds was made to depend upon its compliance with the conditions prescribed in the vote, and made part of the subscription; and that the right of the railroad company to demand the bonds is the exact measure of the power and authority of the county and its officers to execute and issue them.

That the conditions upon which the subscription was made by the county were not performed by the railroad company.

The contract of subscription, by reason of such default, became void, and bonds issued upon the ground of such void contract do not bind the county.

That all persons dealing in paper issued by the County Judge and County Clerk of Randolph county are to be held to have notice of all the facts before mentioned,

That the county is not bound by the bonds issued by the County Judge, or the coupons issued by the County Clerk, or the recitals in the bonds so issued, because neither the Judge or Clerk, *virtute officii*, have lawful authority to issue such bonds or coupons, or ascertain or declare any fact required to confer authority upon the county or its officers to execute such bonds.

The plaintiff, on the trial below, proved—and it must be held here that the Circuit Court found that the vote and subscription to the stock of the Chester & Tamaroa Coal and Railroad Company were upon the condition that the railroad company should complete its road from within

of 1870, municipal corporations were deprived of all pre-existent powers with respect to the issue of their bonds to railroad corporations, except such as were essential to the discharge of existing engagements.

The power of Randolph county to issue its bonds, like its engagements, was conditional and dependent upon the performance by the railroad company of the conditions upon which the subscription was voted by the people and made by the County Court, and because the condition never happened, and because it was impossible that it should be performed, it was impossible, after the 27th day of December, 1871, that the power should ever exist; so that on the 1st day of January, 1872, the time the bonds bear date, no circumstance could exist to authorize the issue of the bonds in question.

The date of the bonds furnishes the point of inquiry, for to that date those who deal in the securities of corporations must and do direct their attention.

The plaintiff below was bound to know, and is bound by all the facts and circumstances that affect the powers of the corporation to issue the bonds, that existed at the date of the bonds, and is also bound to know that the officers of the corporation acted in excess of their authority, as settled in Jackson county *vs.* Brush, before cited.

No Court has yet held that it will infer a power in a municipal corporation to issue its bonds, from the mere fact that bonds have been issued in its name, nor will the required power be inferred from the declaration of corporate authorities, whether made by way of recital in instruments issued by them or otherwise.

The rule goes no further than that when the power to do the act is shown in any competent manner to exist, to

be exercised under certain circumstances, *bona fide* holders are justified in relying upon recitals as evidence that the power was properly exercised.

The County of Randolph had no authority to subscribe to the capital stock of the Chester and Tamaroa Coal and Railroad Company.

We have already quoted from the summary of the law in respect to municipal bonds—16 *Wallace*, 464–5—that a legislative grant of a power to issue such bonds is essential to their validity as the obligations of the corporation.

The Chester and Tamaroa Coal and Railroad Company to which these bonds and coupons were issued in payment of a subscription to its capital stock, on behalf of Randolph county, was created by two acts of the General Assembly of the State of Illinois. The first will be found in *Private Laws*, 1869, *Vol.* 2, *p.* 824; the second in the same volume, page 859, and are set out at length in the record, pages 12, 13.

Both of the acts creating the corporation are silent as to municipal subscriptions to the capital stock of the company.

It is therefore inferrable from the silence of the acts that such subscriptions were not in legislative contemplation.

The authority of the county to make the subscription and issue the bonds, it is claimed, was conferred by an act entitled "An act supplemental to an act entitled 'An act to provide for a general system of railroad incorporations,' approved Nov. 6, 1849"—which is also printed at length in the record, pp. 15–16.

The first section of the act of Nov. 6, 1849, authorizes the county courts of counties, upon the direction of the legal voters of such counties, to purchase or subscribe for shares of the capital stock of any "*Railroad Company*" and the stock when acquired to be under the control of the county court, *in all respects as stock owned by individuals.*

The second section authorizes the issue of the bonds of counties in payment for stock subscriptions.

The statute authorizes subscriptions by counties to the capital stock of "*Railroad Companies*," and none other; and we are to determine whether The Chester and Tamaroa Coal and Railroad Company is a railroad company within the meaning of the act.

To do this, we must look to the laws creating the corporation; we do so, and find that the *title* of the act creating it is, "An act to incorporate the Chester and Tamaroa *Coal* and Railroad Company," and the acts confer upon the corporation the *name* of "The Chester and Tamaroa *Coal* and Railroad Company."

In a further effort to ascertain the character of the corporation, we proceed to an examination of the body of the act creating it, and find that after the examination of its general corporate powers, it is "vested with all the powers, privileges and immunities which are or may be necessary to engage in *mining*—and to construct and operate a railroad from Chester to Tamoroa." *Sec.* 1, *Record*, *p.* 13.

It is impossible for the court to choose between the two leading objects intended by the legislature in the creation of the corporation, or to separate them, and attach

to one a greater importance than it will concede to the other.

It is also certain that it was not intended by the legislature that the objects of the corporation should be treated as in any sense separate, for all the subsequent provisions of the act indicate that the legislative purpose was to provide that the business of the company should be comprehensive, and that *all* of its powers should be exercised to promote its general objects, which are, the mining of coal, the manufacture of iron and other minerals, and the construction and operation of a railroad.

We have seen already, that the first object of the corporation stated in the charter is, that it should *engage in mining*. In aid of this object, and to confer upon the corporation larger power, it is authorized by the supplemental act to lease, purchase and hold real estate, at any point along "their" road, manufacture iron or other minerals, establish machine shops and furnaces, mine coal, and establish docks, to facilitate the transportation of their products. *See Supplemental Act, Record, p.* 14.

And to borrow money to carry on their mining and manufacturing business.

It is true that the corporation is also authorized to construct, maintain and operate a railroad, and transport persons and property thereon, but it appears that the power to construct the railroad was intended as a mere aid to what were considered its more important objects.

This would not make it a *railroad* company, within the meaning of the act.

A railroad from Chester, on the Mississippi river, to Tamaroa, on the Illinois Central railroad, passing through lands rich in minerals, for a distance of forty-one miles,

affording an outlet to the great markets, was no doubt supposed to be indispensible to the success of the extensive mining and manufacturing business contemplated by the corporators, and such a line of railroad would be required as the base of the lateral or branch road to the coal lands of the company, which the corporation is by the act authorized to construct "*if necessary for the successful prosecution of its business.*" *See Sec.* 1, *Record*, *p.* 13.

The Chester and Tamaroa Coal and Railrod Company is, therefore, not a *railroad company* within the *letter* of the act of Nov. 6, 1846.

And it may also be stated upon the sure foundation of principle, that it is not a *railroad company* within the *intent and meaning* of the act of 1849.

It is a rule that the courts will not so interpret an act of the legislature, as by that means to bring it in conflict with the constitution, and such would be the effect of a construction of the act of 1849 as is maintained by the plaintiff below.

We have sufficiently discussed the acts creating the Chester and Tamaroa Coal and Railroad company, and have, as we think, shown that it is a general business corporation, and not a *railroad corporation*, within the meaning of the act of 1849. And that the authority to construct a railroad is but one of the powers conferred upon it to be employed when necessary for the successful prosecution of its business.

It is obvious from the first section of the act of 1849 that it was the intention of the legislature, that counties and cities, which should under the provisions of the act become stockholders, in the class of corporations referred to, should acquire and possess all the rights and powers,

and be subject to all the burdens and liabilities of other stockholders.

It provides that the stock purchased or subscribed for, should be under the control of the City Council or the County Court in all respects as stock owned by individuals.

It is impossible to suppose that the legislature intended by the act of 1849, in the use of the words "railroad company," to comprehend corporations like The Chester and Tamaroa Coal and Railroad Company, and to enlist the counties and cities of the State in mining, in making lateral or branch railroads to any coal lands belonging to the company, and in borrowing such sums of money as may be necessary for completing and operating a railroad, for conducting the mining and manufacturing business of the company, and to mortgage all the real and personal property of the corporation including the railroad constructed, with the proceeds of the county subscriptions; to secure the payment of debts contracted for any of the purposes of the corporation.

Nor can it be imagined that it was the purpose of the legislature to permit counties to become stockholders, with all the rights and duties of individual stockholders in corporations empowered to lease, purchase and hold real estate along the line of the railroad, so far as necessary to mining and the manufacture of iron, and to manufacture iron or other minerals, and to exercise such other powers as are conferred upon the corporation by the original and supplemental acts.

The legislature, by the first section of the act, leaves no doubt of its intention, that subscribing counties and cities should, when they become stockholders in the cor-

porations intended—railroad companies—possess all the powers, and be subject to all the duties that the relation of stockholder secures to, or imposes upon individuals. To say that the legislature did intend by the act to authorize counties and cities to become interested in the purchase of mineral lands, in mining, in the manufacture of iron and other minerals, in the ownership of shops and furnaces, and docks to facilitate the transportation of coal, iron and other minerals, as individuals may by the purchase of stock in such corporations, is to assert an absurdity not warranted by the language of the act, or a proper respect for that department of the government.

To say that the act authorizes counties to purchase stock in a corporation, upon the ground that *one* of its objects is the construction and operation of a railroad, without intending to enlist the county in the other business of the corporation, or subjecting the interests acquired by the county in the railroad constructed, to mortgage or sale for the security of the debts contracted by the corporation in its general business, and that, too, without a participation in the possible earnings or profits of the business, is equally outrageous.

It can make no difference in results, whether the legislature has failed for want of intention or for lack of power, to authorize the county of Randolph to become interested in all the affairs and business of the Chester and Tamaroa Coal and Railroad Company. The act of Nov. 6, 1849, authorizes counties to become subscribers for, or purchasers of the stock of *railroad companies*. If this corporation is anything more or less, or different from a railroad company, it is not within the act.

We now maintain that it is not within the constitutional power of the legislature to confer upon counties au-

thority to subscribe for shares of the capital stock, or to issue its bonds in payment of subscriptions to the capital stock of such corporations, even if it were clear that there was such an intention.

The Supreme Court of Massachusetts, in the case of Lowell *vs.* Boston, cited 2 *Dillon's Reports*, 365, states the proposition we advance, in these words: "The issue of bonds by the city (or county), whatever provision may be made for their redemption, involves the possible, and not improbable consequence of a necessity to provide for their payment by the city. The right to incur the obligation implies the right to raise money, by taxation, for the payment of the bonds."

The expenditure authorized by this statute, being for private, and not for public objects, in a legal sense, it exceeds the constitutional power of the legislature.

The same question has been stated and discussed in many of the courts, but no where more intelligently than in the opinion of Appleton, Ch. J., in the case of Allen *vs*, The Inhabitants of Joy, 11 *Am. Law Register*, (*U. S.*) 48. and reported also in 11 *American Reports*, 185. See, also, Com. Bank *vs.* Iola, 2 *Dillon*, 359. And this Court, in the case of Citizens Bank *vs.* City of Topeka, decided at the October Term, 1874, upon a full review of all the authorities, has, by an unanimous opinion, reached the same conclusion.

In can make no difference in the application of the proper legal principles to the facts of this case, that the vote of the people, and the subscription made by the County Court of Randolph county, was made on condition that a railroad should be constructed and operated by the coal and railroad company before the county should be

obliged to receive the shares of the capital stock subscribed for, and pay for them by an issue of its bonds, nor that the corporation did or did not, before the contract of subscription became absolute and binding, by its terms, actually construct a railroad, and put it in operation, or that the proceeds of the bonds were actually expended by the corporation in the construction of a railroad.

The act of Nov. 6, 1849, authorizes counties to aid corporations to construct railroads, only by becoming owners of shares of their capital stock, and the authority to issue bonds is limited by the act to the purchase of stock.

The county could not contract with the Coal and Railroad Company for building a railroad, or make a donation to the corporation to promote the construction of a railroad.

If, from the character or objects of the corporation, counties are incapable of purchasing or holding shares of its capital stock, and participating in the exercise of all its authorized powers to the extent that individual stockholders may, then the corporation is not a railroad company within the meaning of the statute, and the subscription and bonds are void.

In concluding this branch of the subject, we maintain—

1. That the county of Randolph had no capacity to become a shareholder in corporations, other than that conferred upon all counties by the act of 1849.

That act confers the authority upon counties to become shareholders in but one class of corporations, and it only authorized counties to aid in the construction of

railroads by becoming the owners of shares in the stock of that class of companies.

If, from the nature of this corporation, the county of Randolph could not become the purchaser of shares of its capital stock, and participate in all its purposes to the extent that private individuals may, every other fact or circumstance in the conduct or acts of the coal and railroad company, or of the people of the county, or their officers, is immaterial, and imposes no liability.

2. To assert that a county may bind itself by bonds issued, to secure the construction of a railroad, without becoming a subscriber to, or purchaser of shares of the capital stock of the company by which it is constructed, is to assert that counties may issue valid bonds in aid of the construction of a railroad, without reference to the law of 1849, which is equivalent to saying that it may do so without law, for none except the act of 1849 is recited in the bonds, or relied on to sustain the power.

3. To assert that the bonds and coupons sued on are valid because the proceeds were used in the construction of a railroad, is to assume that to be true in fact, which is not alleged by the pleadings, or shown by the evidence; and implies a concession that if the money realized from the bonds had been used by the corporation for any other of the objects for which it was created, they would be void.

This concession deprives the bonds and coupons of the character of commercial paper claimed for them, and reduces them to the class of simple contracts, and would render it necessary to aver and prove the consideration upon which they were issued.

4. To assert that a county may become a stockholder in a corporation, to the extent of participating in the exercise of some, but not all of its powers, is to disregard the statute, as well as the general principles of law.

We call the attention of the court to the fact that the charter of The Chester and Tamaroa Coal and Railroad Company was passed at the session of 1869, and the 2700 pages of special laws of that session contain numerous charters for corporations, in which express authority is given to municipal corporations to subscribe to their stock, from which it is fair to infer that no such authority was intended, in respect to this corporation. In the class of cases referred to, the legislature declared their objects to be *public*, but in the case of this corporation, no such declaration was made, and the questions to be decided are therefore purely judicial.

JOHN M. PALMER,
Of Counsel for Plaintiff in Error.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, A. D. 1876.

THE COUNTY OF RANDOLPH.
Plaintiff in Error,

vs.

AUGUSTUS T. POST,
Defendant in Error.

Error to the Circuit Court of the United States for the Southern District of Illinois.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

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SPRINGFIELD:
Frank Hudson, Jr., Printer, 221 S. 5th Street.
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Plaintiff in error insists there are two main reasons why the bonds and coupons in question are invalid:

First. Because the subscription was a conditional one, and the condition was not complied with.

Secondly. Because the railroad to which this subscription was made was not the *kind* of a railroad contemplated by the act of Nov. 6, 1849.

Let us examine these reasons in the order mentioned.

It seems to be *assumed* on behalf of plaintiff in error that the condition of the subscription was not complied with?

What is there in the record to justify this assumption?

The condition was, that unless the railroad should be completed to the county line, between Perry and Randolph counties, from within the corporate limits of Chester, within 18 months from June 6th, 1870, the bonds should not be paid or registered.

So far as we can discover, there is nothing in the record to show that the railroad was not completed within the time required by the contract of subscription, but on the contrary, the record contains direct proof that it was so completed. On page 11 of the printed record we find that "plaintiff proved *that the road was* built and *completed within* "*the time required by the Court*, through the county of Randolph, *accord-* "*ing to contract.*" As this special finding, or statement of fact, contained in the record, is no where contradicted, we think it should be conclusive of this question. However, as our opponent, in his brief has indulged in the *assumption* or *statement*, that the road *was not* completed from Chester to the county line until *after Dec.* 27th, 1871, and bases a constitutional argument thereon, we will briefly examine that portion of the record from which we suppose he inferred this fact to exist, and will also answer, as best we can, his argument.

All that we have been able to discover in the record that in any manner warrants his inference, that the road was not completed until after Dec. 27th, 1871, is a recital of the County Court in its order of Oct. 6th, 1871. It is there, among other things recited, that on that day the president of the R. R. Co. and others, appeared before the County Court and represented "that on account of unprecedented low water in the rivers, the said company finds it impossible to get their iron on the ground in the time contemplated by the previous orders of this Court." This order, after reciting this and other facts, then provided for an extension of the time to the 1st day of February, 1872. To be candid, we suppose this recital and this extension of time by the order, is the

ground for this inference. But is it sufficient ground, taken alone, to support the inference? Are there not other facts recited in the record which, considered in conjunction with this, proof positive? Page 11 of the record puts the question beyond all controversy and leaves no ground for indulging in inference.

The order also recites, that at the date Oct. 6th, 1871, "the work was *far advanced toward completion.*" It also recites that the company was *then* doing all it could to complete the road *within the time.* And when we recollect that at the time these recitals were being made, *ninety-two* days still remained before the expiration of the original contract time, can we hesitate to conclude that the road was completed within the contract time, as is substantially stated on the page of the record referred to. Such an inference as plaintiff in error indulges in, would be directly in the face of the proof contained in the record. All this Court can do is to examine the record and see if there are facts contained in it sufficient to have justified the judgment of the Circuit Court, and in making this examination for the facts it will hardly *infer* them to be otherwise than what the record positively states them to be. Here, the record says the road was completed within the time required by Court according to contract; is this not conclusive? We think it is.

Plaintiff in error may contend that the word "contract" used on page 11 of the record means the order of extension of Oct. 6th, 1871. This meaning, however, can not be attributed to it without confusing distinct terms used in the record, for on page 10 of the printed record, the word "contract"—meaning the contract of subscription—is mentioned in the same connection with, and contradistinguished from, the "order of the County Court extending the time." If this be a fact then, appearing of record as we insist it does, that the road *was completed according to contract*, this first branch of the argument would end here, because the constitutional provision quoted by plaintiff in error would have no application.

We will assume, however, for argument's sake, that the road was not completed to the county line prior to Dec. 27th, 1871; what then would be the legal status of defendant in error as the owner of these bonds and coupons, in connection with the other facts disclosed by the record?

According to our understanding of the decisions, the rights of the defendant in error concerning these bonds in controversy would be better, if anything, and somewhat different from, what might have been, perhaps, the rights of the Chester & Tamoroa Coal & R. R. Co. to them at the date of Dec. 27th, 1871, assuming that the road was not completed at that date according to contract. But if the constitutional provision quoted on pp. 4 and 5 of our opponent's brief would have no such bearing on the case as to have cut off the right of the R. R. Co. to these bonds at the date, and upon such failure to perform as above stated, then surely the provision would not vitiate them in the hands of defendant in error.

Let us examine first what would have been the rights of the company. The separate article of the constitution quoted, contains a proviso saving the rights of municipalities and R. R. Companies to enter into contracts of subscription after July 2d, 1870, provided it has been authorized by a vote had under some law prior to that date. Now, in view of the U. S. Supreme Court having decided that a vote merely does not constitute a contract of subscription, and is really of no binding force (as it has in the cases cited below), it must be admitted that the effect of this proviso is to save very shadowy rights.

Aspinwall vs. County of Jo Daviess, 22 How.

Town of Concord vs. The Portsmouth Savings Bank.

Marsh vs. Fulton County, 10 Wall.

Harshman vs. Bates County.

U. P. R. R. Co. vs. Davis County, 6 Kas., 256.

In effect, it saves the right of a municipality and a R. R. Co. to transform a mere shadow into a substance; or to convert a mere wish

into a binding contract; provided only the shadow existed, or the wish was expressed by a vote, prior to July 2d, 1870. Notwithstanding this evident design of the constitution to respect the rights of parties who, before its adoption, had merely taken this one step (*nudum pactum*, at that) towards subscription; we are told that where, as in our case, parties have not only taken this step, but have also entered into a contract prior to July 2d, 1870, they shall not, *after that date*, if a condition in the contract is broken, have the ordinary legal privilege of waiving it, or in anyway of modifying it, to suit the necessities or contingencies of the moment; or, makingthe application to this case, they say, when there was a failure to complete this road to the county line by Dec. 27th, 1871, then, no matter how near complete it was; no matter how muchl had been performed of the contract; no matter what the circumstances were which prevented complete performance at that date; the power of the county and its officers was then met by this provision of the constitution and cut off from all right to waive any condition, or in any way modify the contract. If this be one of the true constructions of this provision, then, as we have seen, on the one hand it saves the merest shadow of a right, and upon the other would deny substantial legal rights.

We do not think that this separate clause of the constitution, taken in connection with its proviso, was ever intended to work such injustice. We believe it was intended by it that where the legal voters of a municipality had, prior to that date, expressed their desire by an election held under some law authorizing it, to aid in the building of a railroad which would be of benefit to them, that such municipality should have the privilege after the adoption of the constitution to bind itself so to do by a contract, and that such contract, when so made, and the rights of the parties to it, should be thereafter subject to the ordinary rules and principles of law governing contracts. We think, too, we are borne out in this construction by the language of another provision of the constitution, which seems to throw light upon the meaning of this pro-

viso. The schedule to the constitution of 1870 reads thus—"That no inconvenience may arise from the alteration and amendments made in the constitution of this state * * * it is hereby ordained and declared, § 1, That all rights, actions, prosecutions, claims, and contracts, of this state, individuals, or bodies corporate, shall continue to be as valid as if this constitution had not been adopted." What rights, or claims, of bodies corporate, or individuals, are here intended to be kept valid, if not the ordinary legal rights and claims of parties to a contract already made, to waive conditions in it, or modify it, or assert and enforce their ordinary legal demands under it, where necessity requires it or the parties can agree to it? It will not be contended but that the constitution of 1848, which was the one that underwent the alterations when the present one of 1870 was adopted, would have allowed these contracts of subscription to have been made *and modified ad libitum*, provided only there was statutory authority and principles of law for it. Now, if the new constitution has a clause which saves all rights in order to preven, inconveniences arising in the change from one constitution to the other then certainly contract rights, the enforcement of which would have been allowed under the old constitution, are intended to be saved under the new. It certainly would be a great *inconvenience*, if after parties should have entered into a valid contract, and performance on one part had been substantially completed, and entire performance by the time agreed only been prevented by an act of God, and the other party under the circumstances was willing to waive the condition of time and allow a completion, for this constitution of 1870 to intervene, and be so construed as to cut away from around it all the ordinary rules and principles of law which govern the rights of the parties to it.

What would be ordinarily the rules of law governing the rights of the parties to this contract at the date of Dec. 27th, 1871, under the circumstances of this case as disclosed by the record? We are assuming the contract was valid when made, and remained so until this condition was broken at the date above mentioned. Surely, the appearance of

the president and others on behalf of the company, on Oct. 6th, 1871, and their showing before the County Court at that date, "that on account of the unprecedented low water in the rivers it would be impossible to get their iron on the ground in the time contemplated by the previous orders of the Court," and the Court thereupon granting an extension of time to the 1st of February following, would not of itself vitiate the contract at that date. The company still had 92 days left within the original contract time to complete the road if it could. This waiver of the condition at that date, if it was done by the wrong corporate authority, or done contrary to law, only had the effect of misleading the company into more work, and inducing them in good faith to believe that if they went forward and completed the road, even after Dec. 27th, 1871, they would still be entitled to and would get their bonds according to contract. They certainly were encouraged by this order to complete the road, which they did, and put it in permanent operation from Chester to Tamaroa.

We understand the law to be as laid down by *Parsons on Contracts*, 2d vol., p. 672: "The non performance of a contract is not excused by an act of God, where it still may be substantially carried into effect, although the act of God makes a literal and precise performance of it impossible."

If the literal and precise performance of this contract, in point of time merely, was not effected at the date of Dec. 27th, still, we believe the record shows it was substantially performed at that date; and it would have been no legal excuse for the company *then* to have said to the county, on account of unprecedented low water in the rivers, which we could neither foresee nor guard against when we made this contract, it is now impossible for us to accomplish a literal and precise performance, and therefore we will not finish it. The county could have compelled performance, and the law would have been against the company for refusing. There was no necessity, however, for the county to compel, because the company was willing to perform, and only asked for a

trifle more time to do it in. Let us ascertain from the record, as near as we can, how much this trifle of time was, if there was any of it at all, beyond Dec. 27th.

It is recited on page 11 of the printed record, that the road was completed and in permanent operation from Chester to the county line before the bonds were delivered. How long before, it does not say. Whether before or after Dec. 27th we do not know, except from this statement of the record, which says that it was completed according to contract; which statement, however, we are leaving out of the discussion for the present. There were just 23 days between Dec. 27th and the date of the delivery of the bonds, Jan. 19th, 1872; and if not before this first date, yet at the furthest between these dates sometime, the road must have been completed. Taking the whole twenty-three days as the extension of time and it would be, as we have said, but a trifle in the completion of a work like this. Then are we not justified in our conclusion, that the road was at least substantially completed at the date in question? Its literal and precise performance as to a trifle of time, merely, was all the failure there was, and this being prevented by an act of God, as we look upon it, would not have excused the company *then* refusing to complete the road.

If the county, then, could have compelled a completion, and the company in law was not excusable in refusing to complete, why might not the parties, by a waiver of a condition in the contract, accomplish that which could be accomplished by legal coercion? We say they could. And their ordinary legal right to do so is preserved by these provisions of the constitution, instead of being cut off by them as our opponent insists. Supposing further, that this condition of time in the contract was of the strictest kind in law; for instance, making time of the essence of the contract, what then would have been the legal rights of the county and the railroad Co. under the circumstances of this case? *Parsons on Contracts*, 2d vol., p. 660, says: "Where time is of the essence of the contract, the promissee would not be permitted to receive

and retain the work after the due time of delivery and make no compensation; either his acceptance would amount to a waiver of the condition of time, or the other party might have his action on a *quantum meruit.*" So that, if we admit that part of this work was done—"after the due time of delivery"—and that time was of the essence of the contract, yet the county after that time received, and still retains, its certificate for $100,000 of the stock of this road, does not this act itself constitute a waiver of this condition, aside from the order of Oct. 6th, 1871? And the road being completed, was not the company entitled to more than its *quantum meruit* rights? was it not entitled to the bonds?

But why should the condition of time in this contract be construed as of the essence of the contract? The intention of the parties is the thing sought after in construing contracts, and this is not always determined from the language used, but often by the assistance of circumstances surrounding it which indicate the intention. If this was a contract between the *voters* of Randolph county and the company, then where is the evidence that the voters intended time to be the essence of it? Section 78 of the act of 1849 leaves it discretionary with the county judges whether the stock to be subscribed for shall be paid for in bonds, or otherwise. If they decide upon bonds, then Sec. 80 of the act provides that *the county judge* may create the debt by subscribing, if the legal voters shall first vote for it. The notices shall specify the company in which stock is proposed to be subscribed; the amount it is proposed to take, and the time which the bonds proposed to be issued are to run, and the interest which said bonds are to bear. Nothing more than this is required by the *law* to be submitted to the voters. What evidence is there in the record anywhere that the *voters* imposed this condition of time upon the company, or ever knew of it until after the subscription was made? If the county judge then, or the county court, imposed this condition of time, why had not the same authority the right afterwards to waive it without consulting the voters? And if this

same authority that imposed it waived it, is that not evidence that such authority did not intend it to be of the essence of the contract.

When the company became apprehensive, about Oct. 6th, 1871, that it would be unable to complete the road within the time fixed, there was no attempt made to consult the voters about this extension of time, but application was made direct to the county authorities that had imposed the limitation, and it was extended. If the county Court was not the proper authority to extend the time by waiving this condition, it at all events interpreted the law as giving it this authority. Section 77 places stock "subscribed for" under the control of the county Court, the same as stock owned by individuals; and section 80, as we have said, seems to authorize the county judge to incur the debt, or make the contract of subscription. If the law gives the county judge the power to subscribe, why should he not have the power under the law to waive any condition of his contract for proper purposes and where it would be just and right that it should be done. But we will discuss further, and under another view, what importance it may be in this case, whether or not the county Court was the proper corporate authority to waive this condition.

We do not think that time was intended to be of the essence of this contract, either by the voters or by the county Court. What the county wanted, when it subscribed, was a railroad. And it is not supposable that they cared, when they subscribed $100,000 to such an important enterprise as this, whether it would be finished *twenty-three* days before or after the contract time.

Then, we conclude, that so far as the railroad itself was concerned, it had a legal right to have demanded and received these bonds from the county when it did, and that they would have been valid in its possession had they remained there.

We believe that the separate article of the constitution quoted did not affect this contract, because it was within its proviso. We think, further, that the right of these immediate parties to the contract to

waive conditions in it after July 2d, 1870, was expressly saved by the language of the schedule which we have quoted; because such rights would be legal rights, commencing with the inception of the contract and following it to its consummation. And we believe further, that aside from the county order of Oct. 6th, 1871, the act of the county in receiving and retaining the stock after the due time of delivery, was in law a waiver of this condition between it and the railroad company. And here we will call attention to the fact that the three trustees who exchanged the bonds for the stock under order of the county Court of Sept. 6th, 1871, were composed two-thirds of county officers, the judge and clerk; so that it can not be claimed that the stock has never been received by the county, for it went directly into the hands of its officers.

In the next place, we insist that the title of defendant in error to these bonds rests upon stronger grounds than that of the Railroad Co. The constitutional questions, we suppose, affect both alike. But there are others which might affect one and not the other, because they occupy a different legal attitude toward these bonds.

This Court decided, in the case of Smith vs. Sac County, 11 Wall, 139, in an action founded on negotiable bonds issued by a public corporation, that where the defendant has shown fraud in the origin or inception of the instruments, this will throw upon the holder the burthen of showing that he gave value for them before maturity.

The record in this case does not show fraud, so that this proof is not upon defendant in error, but in law he is presumed to be the purchaser before due. If this be his legal attitude toward the bonds, how would the question of the condition in the contract, or its waiver by the county Court, affect him? It is not claimed that this condition was disclosed on the face of the bonds, nor by the law under which the subscription was made. But it is very ingeniously attempted to visit notice of it upon defendant in error by saying that the *date* of the bonds afforded a point for inquiry. That, as they were dated subsequently to the adoption of the constitution, this imposed the duty upon him of

making inquiry into the records of Randolph County, to see if the officers who issued the bonds were authorized to do so; and if they had strictly complied with their authority; and in making this inquiry the records would be notice of all they contained. We can not see how the point of inquiry is very suggestive, or calculated to put the purchaser on his guard. Although the bonds bear date after July 2d, 1870, they at the same time recite that they were issued in pursuance of an election held *June 6th*, 1870. So that the date is coupled with the recital of a fact, which would allay all suspicion on the purchaser's part, as he would know at once that the case fell within the proviso of the separate article. Of course, if the purchaser had investigated the County Court records he would have discovered that this contract of subscription contained a condition; and had he then investigated further matters *in pais*, he would have learned that the condition was not strictly complied with in point of time. This kind of an inquiry, we do not believe, the law requires of a purchaser. Because there is nothing coming to his knowledge before buying to suggest the necessity of inquiry.

Dillon on M. C., (2d ed.,) 1st vol., §. 420, note 1.

Although this condition was in the consract of subscription, it was a part of the contract which originated purely as matter of agreement with the parties, and was nowhere to be found except upon the records of Randolph County. It was in the nature of a private ordinance imposed by the County Court of Randolph County; and it has been decided "that the issue of the bonds *proves* that conditions precedent, imposed by ordinance, have been complied with, or waived."

Commonwealth vs. Pittsburg, 43 Pa. St., 391.

Gilchrist vs. Little Rock, 1 Dillon, C. C., 261.

And Judge Dillon, in a recent law article published in the Oct. No. of the Southern Law Review, states the law to be that preliminary conditions of this kind are in the nature of facts *in pais* which it becomes the duty of municipal officers issuing the bonds to determine before

they issue them, and their decision, either stated or implied, in the recitals, is conclusive. If the election in this case only authorized a conditional subscription, and the officers who issued the bonds recited in them that they were issued in pursuance of the election, this, to say the least, was an implied decision that the condition had been complied with. From the very nature of this condition precedent, it was more in the power of the officers of Randolph county to know whether it had been complied with before they issued the bonds, than it was in the power of a purchaser to know it; and consequently it became *the duty* of the officers to decide this question, and their issuing the bonds containing the recital that they were issued in pursuance of the election estops the county from contradicting it. The county ought much more to be estopped in this case from contradicting the recitals of its officers in the bonds than where they recite that conditions precedent required by statute have been complied with, because a purchaser would have some notice of this latter condition and could investigate whether it had been complied with; but in the case at bar there was no notice that such a condition existed, and how could defendant in error investigate?

The authorities are so abundant and familiar to the Court, where the doctrine of estoppel has been applied in cases where the officers, whose duty it was to decide as to the performance of statutory conditions precedent, have recited in the bonds their performance, when such was not the fact, that we refrain from citing or commenting upon them. Suffice it to say they extend all the way from cases in 2 Black, and 5th Wall., to the recent case of Humbolt Township vs. Long et al.

It was said in the leading case of Commissioners of Knox Co. vs. Aspinwall, 21 How., that the question whether the notices for the election were given as required by law had to be decided as a condition precedent by the board *because no other tribunal was provided for the purpose.* In the case at bar, what other authority was provided to determine whether the road was completed as required by the condition, other than the trustees appointed by the order of Sept. 6th, 1871. They

delivered the bonds and reported the fact to the County Court, and their action was by that tribunal approved. (Printed record, p. 12.)

In the case last cited it is said that it would be too late to call in question the decision of the board, after the authority has been executed, the stock subscribed, and the bonds issued and in the hands of innocent holders, *even in a direct proceeding.* If so, is it not too late to call in question the decision of these trustees to the prejudice of defendant in error, a purchaser for value, before maturity? It will perhaps be further urged on behalf of plaintiff in error that this recital in the bonds, that they were issued in pursuance of the election, was false, and that false recitals by the officers can not bind the county.

Dillon on Municipal Corporations, vol. 1, Sec. 419, states the law thus: "Officers are the agents of the corporate body * * * *ordinarily*, "their unauthorized representation that they have power to do an act "is not binding upon the corporation, but to this rule are two excep- "tions;" one, "where it is the sole province of the officers who issued the "bonds to decide whether conditions precedent have been complied "with," and secondly—"where both parties have not equal means of "knowledge as to the extent and scope of their powers, and when the "particular character of their commission and authority is, from its "nature and circumstances, peculiarly known to the officers, or agents, "in which case, the principal will, or may be, bound by the false repre- "sentations of the agent respecting his authority and its extent and "scope." It will hardly be contended that a purchaser, in a New York market for instance, when these bonds were offered him in due course of business by an owner who might know as little about their history as he himself did, should or could possess the same means of knowledge as to the extent and scope of the powers of the officers of Randolph county as those officers themselves. So that, if the condition in the contract of subscription, or any of the county orders, only allowed the trustees to deliver these bonds upon strict compliance with the condition of time, the county officers, who constituted two-thirds of the

trustees, would know this, but the purchaser could not know it unless he first examined the county records, and then investigated the question of fact as to when the road was completed to the county line. To require this of a purchaser before buying would destroy the negotiability of the bonds; and the exception laid down by Mr. Dillon would then be meaningless, because there would be no room for comparison between what a purchaser would know of the authority of the county officers, and what the officers would themselves know, as they would both then have equal means of knowledge. Defendant in error, then, as we have said, is in a different, and better legal attitude, toward these bonds, than the railroad company would have been. And as there was authority of law in this case to subscribe; and the bonds were issued in a negotiable form by the *County Judge and Clerk* and the trustees, under the order of the county Court of Sept. 6th, 1871; and they recited that they were issued by virtue of power contained in the act of Nov. 6th, 1849, and in pursuance of the election held the 6th day of June, 1870; this state of facts invokes in behalf of defendant in error the doctrine of estoppel as announced in numerous decisions, a few of which we cite without comment or quotation.

Commissioners of Knox Co. vs. Aspinwall.
Grand Chute vs. Winnegar.
Mercer County vs. Hacket.
Gelpecke vs. City of Dubuque.
Meyer vs. The City of Muscatine.
Humbolt Township vs. Long et al.

And in closing our argument and authorities upon this first branch of the case, we respectfully submit to the Court:

1st. Whether there is anything *in the record* to show a non-compliance on the part of the railroad company with this condition of time in the contract of subscription.

2nd. If, for argument's sake, it should be assumed that it was not complied with, still was there anything in the constitutional provision

quoted to prevent the county waiving that condition under the facts of this case.

3rd. Does not the scope and intention of the first section of the schedule to the constitution of 1870, save the right of the parties to this contract of subscription to waive the condition of time, according to the well recognized rules and principles of law.

4th. Whether, or not, the county Court was the proper corporate authority to waive this condition, is not the county estopped? by the issue of the bonds and their recitals, from setting this up as a defence against the defendant in error; the record not showing fraud in the origin, or inception of the bonds.

It is urged as a second main reason why these bonds are void, because the County had no power to subcribe to a *Coal and* Railroad Co.: and various arguments, and some authority claimed to be applicable, are adduced in support of the position; the act of Nov. 6th, 1849, is cited upon the face of the bonds by title, as the law authorizing their subscription and issue, and were it not that the Charter of the Co. is somewhat peculiar and exceptional, it would not be contended for a moment but that the act of 1849 furnished ample power for the purpose in question. The act of 1849 provides that *any* county in the state may subscribe $100,000 to *any* railroad company in the state organized or to be organized, &c, This general law certainly was intended to give municipalities power to subscribe to R. R. Companies where the company's charter, if it was organized by a special act, was silent about the right, or when it was organized under a general law; but the fact, that the charter of this road is silent regarding the right of municipalities to subscribe to its stock, is seized upon by plaintiff in error as proof that the legislature never intended that they should hold stock therein; a comparison between this charter and other charters passed at the same session (1869) of the legislature is indulged in on p. 23 of their brief, as showing the singular omission of this power in this charter; and the intention of the legislature is argued therefrom. We may dis-

pose of this argument, so far as it derives force from this comparison, by calling attention to the fact that other special acts of the same session incorporating railroads, were just as silent in conferring this power: for instance the charters of the Fayette Co. R. R. Co., 3 Vol. P. L., 1869; Freeport, Monroe & Superior R. R. Co., ibid; Golconda & DuQuoin R. R. Co., ibid; Jacksonville & Carlinville R. R. Co., ibid; Lewiston & Havana R. R. Co., ibid; Macomb & New Philadelphia R. R. Co., and numerous others. And yet it would not be questioned but that *any* County through or near whose limits *any* of these roads ran might take stock in them under authority conferred by the act of 1849.

It is principally urged that because the act of 1849 only mentions *railroad* companies, therefore a subscription to *this* company, which is a *coal*, as well as a railroad company, could not have been within the intention of the act. It is said that it is impossible for the Court to choose between the two leading objects for which the act created this corporation, or to give one of its objects more importance than the other, or in other words to decide whether its main object was intended to be the mining of coal and manufacture of iron and other minerals, or, the construction and operation of a railroad. And because the objects can not be separated, therefore, a subscription to the company would involve the county as a stockholder in a general trading business in the line of railroading and manufacturing, which it is said the act of 1849 could not have contemplated. Then it is further and somewhat contradictorily assumed on page 16 of the brief, that "the power to con- "struct *the railroad* was intended as *a mere aid* to what were considered its "more important objects." Now, while it is true this company has power to mine coal, and manufacture iron and other minerals, it also has power to construct and operate a railroad from Chester, the county seat of Randolph County, to Tamaroa, a distance of over 40 miles. By Section 2 of the act, the corporation is empowered to take and transport upon said railroad, persons, merchandise or other property,

and to fix, establish, take and receive, such rates of toll for passengers and property transported as the directors may establish and as shall be provided by general law.

By the amendment to the act, the company is empowered "to lease, "purchase, and hold real estate *along the line of their said road* * * and "may, *at any* point or points *along the line of their said railroad*, manu- "facture iron, or other minerals, and may establish, maintain and op- "erate machine shops and furnaces for the purposes aforesaid, and may "mine coal and establish docks *at the terminus of their road*, necessary "to facilitate the transportation of their coal, iron, and other minerals."

It will be seen from a careful perusal of these provisions of the act, that whatever real estate the company is authorized to buy or lease, or whatever coal mining, or iron manufacturing, the company is authorized to do, it must be carried on *along the line of*, or *at the terminus of, the railroad*. What advantage would it be to this company to purchase or lease coal or mineral lands along the proposed route of the road *unless* they constructed and operated the railroad as a means of transportation. The first consideration of importance to this company, and the one to be exercised before it could utilize the other powers conferred, would be the construction and operation of this railroad. After that, it might, or might not, conclude it profitable and advisable to experiment with its other corporate powers in buying or leasing coal and mineral lands along the line of its railroad and at its terminus, and mine and manufacture. If it did not choose to do this latter, there is nothing in the act to compel it to do so. It need not dabble in mining and manufacturing if it was satisfied to construct and operate a railroad alone and make its profits from toll of freight and passengers. In this view, the exercise of the powers conferred by the act would seem to be *severable*, and might very probably, and possibly very profitably, be so chosen to be exercised by the company. But it is not at all probable, or likely, that the company would buy or lease coal or mineral lands along the line of the proposed railroad, and carry on mining and manufactur-

ing, *without first building and having in operation the railroad.* So that, what might seem, from the stand point occupied by plaintiff in error, as the *incidental* power conferred upon the company by this charter, might, upon the other hand, seem to Randolph county to be the *principal* power.

The county wanted the railroad; they did not care for the other franchises conferred by the act. This is quite evident from their providing in their contract of subscription that the bonds so subscribed should not be paid or registered, *unless the railroad* was completed from Chester to the county line within eighteen months from the time of subscription. Nothing was said in the contract about effecting leases or purchases of coal or mineral lands, nor the opening of mines, nor construction of docks or manufacturing establishments. The county was satisfied to pay its bonds just so soon as the company was ready to exercise *one* of the powers conferred by the act, viz.; to operate a railroad from Chester to the county line. And the report of the trustees (p. 12 printed record) shows that so soon as they made it appear to the county that the railroad had been built and cars had run over it from Chester to the county line, merely, the county thereupon ordered the bonds exchanged for the stock. This appears to have been the sole consideration for the bonds. It was all the county aimed to secure by its contract of subscription; and all it seems to have gotten for its bonds at the time of the institution and trial of this suit, as is shown by plaintiff's proof on page 11 of the printed record.

While this may be, by the terms of the act creating it, a coal and mining company, it is by the terms of the same act also a railroad company. It is certain that the company might, from the very nature of the case, exercise the railroad powers conferred by the charter *without* exercising the other powers conferred. If the company should choose to build and operate a railroad without mining or manufacturing, then they would be to all intents and purposes *only a railroad company.* This seems to be all they have so far attempted; and in order

to assist in accomplishing this enterprise *as a railroad company*, the county of Randolph made a contract of subscription with the company to assist them in building this road from its county seat to the county line. The company completed this contract, and called for and received the consideration—the bonds. All the consideration the county seems to have demanded was a railroad completed and in operation from Chester to the county line. It did not stop to inquire if the company had leased coal or mineral lands, or established mines or manufactories along the line, *or at the terminus* of its road.

Now, we ask, is this company not, among other things, a railroad company, and if so, does not the act of 1849 give the county the power to subscribe *to it as such*? The object of the act in allowing counties to do this, was to enable them to obtain railroads through their borders, or contigu ous to their limits, and for the reason, that it was subser v-ing a corporate purpose.

The consideration which this county would get for this subscription of $100,000 to the capital stock of this company *might be* so much stock in the railroad alone, if the company never exercised any other of its corporate powers; or it might be, $100,000 in the stock of the whole of its corporate enterprises, if they were all developed. As we have shown from the record, the company, so far, has developed only one corporate enterprise, and for $100,000 of stock in that one enterprise, the county has executed and delivered $100,000 of its bonds. Now, if the consideration which the company might give the county for these bonds is divisable and capable of apportionment in law, and the county had already, when it delivered the bonds, and has now, a substantial consideration in the railroad, as evidenced by its certificate of stock therein, what legal importance is it in this case, that the county, by this certificate of stock, *may have* a further contingent consideration for its bonds which perhaps it would be unable to use or exercise by reason of its having no legal power to do so; or which, if it could do so, would involve it in the complications of one or more enterprises beside rail-

roading? Stock in one, or more, of these enterprises which the charter empowers the company to engage in, is the only consideration the county could expect or receive for such a subscription; and *Parson's on Contracts*, 1st vol., p. 463, lays down the law regarding the divisibility of the consideration thus—"It is often difficult to say whether a consideration is divisible and capable of apportionment, or so entire that it must stand or fall together. Perhaps no better rule can be given, than that if the thing to be done be in its own nature separable and divisible, and there be no express stipulation or necessary implication which makes it *absolutely one thing*, and that part which fails may be regarded, to use the language of the Court in one case, 'not as a condition going to the essence of the contract;' in such case the failure does not destroy the rights growing out of the performance of the residue."

Now we submit, if the three enterprises authorized by this charter are not in their own nature, or may not be, *separable* and *divisible?* Is there anything in the charter which authorizes them, or anything in the contract of subscription between the county and the railroad company, which, by express stipulation, or necessary implication, absolutely requires these three enterprises to be carried on together, or to constitute one indivisible consideration? If not, then the fact that this charter allows the company to carry on coal mining and iron manufacturing, in which two enterprises the county might not by law be allowed to participate, does not destroy the right of the county to participate as a stockholder in the railroad enterprise, nor vitiate this latter consideration the county has received for its bonds, and with which it was perfectly satisfied until it became necessary to defend against this suit. To the county, from its standpoint at least, we have shown that the coal mining and iron manufacturing feature of this charter is incidental only to the more important and principal feature, the construction and operation of a railroad through Randolph County.

Suppose the remote apprehension of danger suggested by plaintiff in error should be realized, and by reason of the company operating its other corporate franchises by leasing or buying coal or mineral lands along the line of its railroad, or at its terminus, and commencing to mine and manufacture, should involve the county, as a stockholder, in the complications of a general trading business; one remedy would be, as we have already mentioned: The tax payers could, if those enterprises are unlawful for the county to engage in, interfere by injunction and vitiate this part of the consideration for their bonds, leaving the other portion of the consideration—the railroad—as it now is, the sole consideration; or it might be, that being merely incidental to the railroad enterprise, so far as the county is concerned, it would be held a lawful concomitant to go with the other. We can not see that, as an incidental adjunct, or concomitant of the railroad enterprise, it would be so very obnoxious to the corporate interests of the county.

The Supreme Court of Illinois has decided that not only railroads are corporate purposes which counties may tax their people to help build, but that the building of universities and the levying of a tax to pay military bounties were also "corporate purposes," for which municipalities might incur debts and issue their bonds.

Taylor vs. Thompson, 42 Ill., 9.

Burr vs. City of Corbondale, 76 Ill., 465.

And the same Court has defined in general terms a "corporate purpose" to be "a tax to be expended in a manner which shall promote "the general prosperity and welfare of the municipality which levies it."

C. D. & V. R. R. Co. vs. Smith, 62 Ill., p. 277.

As incidental to having a railroad through Randolph County, what could be more promotive of its general prosperity and welfare than opening up along the line, and at the terminus of a railroad passing through its county seat, coal shafts and metal mines and manufactories? These enterprises, managed together, could hardly be said to involve more complication or hazard of business than that of managing rail-

roading alone, where, as some of them now are, allowed by their charters to buy and lease other roads; build and operate branches; buy, mortgage, and lease real estate, &c., &c. By the laws of Illinois their liability is limited to the payment of their stock subscription, and this amount they are liable for anyway by issuing their negotiable bonds. This night-mare, or scare-crow, about the county being involved in the hazards of a *general trade*, is begotten now, for the first time, by the county, and originates in its wish to repudiate its bonds and thus rid itself of a burdensome interest.

The county authorities certainly construed this act of 1849 as giving them power to subscribe to this company as a *railroad company*. And if there is, or was, any doubt whether the true construction of it would empower a county through whose limits the company was about to construct a railroad to subscribe to its capital stock, the county authorities have solved this doubt so far as to assume the power to subscribe under it. This is evident from their reciting on the face of the bonds this act as the law authorizing the subscription. It was held in the case of Van Hostrup vs. Madison City, 1 Wall., p. 296; "that where "the true construction of a charter admits of doubt, and the construc- "tion adopted by the city authorities has been acquiesced in generally, "and acted upon by third persons in good faith in their transac- "tions with the city, it will be precluded by the Courts, in actions "by such third persons, from denying its construction to be the true "one." This authority of the county to subscribe under the law of 1849 to this corporation grew out of the construction of this act of 1849 by the county authorities; and such construction has been generally acquiesced in by every one in the county, and every one dealing with the county concerning these bonds, until the institution of this suit, so far as the record shows.

The county has received a certificate of stock in this road. That certificate it has never tendered back; but while retaining it, is endeavoring to repudiate the bonds which were the consideration for the stock.

In the case of Pine Grove Township vs. Talcott, this Court quoted approvingly from *Sedgwick on Statutory and Constitutional Law*, as follows:

"It must be further borne in mind that the invalidity of contracts "made in violation of statutes is subject to the equitable exception, that "although a corporation in making a contract acts in disagreement of "its charter, where it is a simple question of capacity * * or of power "conferred by its charter, a party who has had the benefit of the agree- "ment can not be permitted, in an action founded on it, *to question its* "*validity*. It would be in the highest degree inequitable and unjust to "permit the defendant to repudiate a contract, the fruits of which he "retains."

If this authority is applicable to this case, as it seems to have been to a similar case, then supposing this county acted in one or more respects in disagreement of the law of 1849, in making or waiving conditions in this contract of subscription, still this contract would be an exception to the invalidity of contracts so made or altered; because, the county is retaining the consideration it has received under the contract.

In the case of Burr vs. The City of Carbondale, 76 Ill., p. 478, where the city, after obtaining the location of a university by the subscription and issue of its bonds, undertook repudiation, the Court said, in concluding its opinion: "The disreputable feature of the case is, "that the same authority doing all these acts, and whose city has re- "ceived the benefits of them, now seeks to repudiate them. There is "no rule of law, equity, justice, or morals compelling this, and we can "not sanction it."

It might be said that the disreputable feature in the case at bar is, that the county which did everything in apparent good faith with the company, until the road was completed and in permanent operation through its limits, and had received, and held, stock in the road without a word of complaint, now seeks to repudiate its bonds in the hands of an innocent purchaser. We think there is no law, equity, justice, or morals justifying its doing so.

CULLOM, SCHOLES & MATHER,

Attorneys for Defendant in Error.

No.

UPREME COURT

OF THE

UNITED STATES.

October Term, A. D. 1876.

ounty of Randolph,
Plaintiff in Error.
vs.
stus T. Post,
Defendant in Error.

Error to the Circuit Court of the United States for the Sou. Distrsct of Illinois

BRIEF AND ARGUMENT FOR

FENDANT IN ERROR.

d this day

A. D. 1876.

Clerk.

LOM, SCHOLES & MATHER

Attorneys for Defendant in Error.